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## Foreword

It gives me great pleasure to write this foreword for the eighth edition of the University of Liverpool Law Review.

Liverpool has a long tradition of student engagement: it suffices to remind that it was the Law Students' Association in 1878 which took the very first step to set up legal education in Liverpool when it invited Dr W. J. Sparrow to undertake lectures on Stephen's Commentaries to articled clerks studying for the Intermediate Examination of the Law Society. A century and a half later, in 2015, law students launched the first issue of the University of Liverpool Law Review. Since then, the Review has become a prized product of collaboration between the Law School and its students, providing a platform for interesting ideas to be debated and advanced by young, emerging lawyers of our academic community. Over the last eight years, the published articles have showcased intellectual wealth and critical mind of our students as well as hard-working dedication of the Review's Editorial Board.

This issue presents remarkable and diverse scholarship written by our talented students and edited with great care by their peers on the Editorial Board. Topics in this volume display the breadth of academic interests shown by students at the University of Liverpool for contemporary social justice issues, such as the European Super League (Gemma Watson), the Dark Web (James Giddins), the Privacy and Electronic Communications Regulations (Chris Eaton), the "Big Five" technology companies and EU competition law (Delisha Dadrewalla), artificial intelligence and the requirements of explainability and transparency (Haijer Al Raisi), the formation of customary international law (Mollie B. Hammerton), as well as the legislative framework on sex workers (Amelia Smith).

The 2021/22 Editorial Board (Susannah Ash, Lucy Barrow, Cristopher Deacon, Florence Gibbs, Luvenia Mark, Eve Hughes Jasmine McGregor) should be congratulated for their hard work and dedication in bringing together this fine collection of essays. I would also like to thank academic colleagues, including doctoral candidates, who kindly agreed to provide comments to contributors to help bring their papers to publication standard. This issue would not have been possible without their invaluable academic help.

Dr Antal Berkes

*Lecturer in Law, University of Liverpool*

## Preface

I would like to extend my thanks to everyone involved with the production of this year's edition of the University of Liverpool Law Review. The editorial board and authors with the insight and advice of several knowledgeable academics within the Law School, have produced another remarkable edition of the Law Review, and I am extremely proud.

As is the case for each edition, we had a multitude of thought-provoking submissions , which showcased the knowledge, personal interest and research undertaken by the students at the Liverpool Law School, all those who submitted should be proud of their hard work and incredible articles. Not only would I like to thank the authors chosen for this edition, but everyone who submitted their work. It was a great pleasure to read your submissions and be immersed in the subject matters which my peers wrote so insightfully.

The board are proud to showcase several articles which represent the knowledge and quality of work at the Liverpool Law School. These articles speak on matters which are thought provoking, key in our society, politics and which are immersed into our daily lives, but most importantly, represent issues and subject matter which their authors are passionate about exploring.

On behalf of the Editorial Board, I would like to thank all academics who have offered their assistance and guidance in the production of this issue. Your specialist knowledge, advice and feedback and affording us your time is extremely appreciated and has been invaluable in curating this issue.

My personal thanks must also be extended to this year's Editorial Board. It has been the most rewarding experience to work alongside all of you, I have found your dedication to the production of this issue inspiring. Although there have been difficulties and uncertainty at times, the continued commitment and professionalism has been palpable, and I thank all of you.

Lucy Barrow

*Editor-in-Chief, University of Liverpool Law Review 2021-22*

## A Note from the Editorial Board 2021-22

Emerging from the COVID-19 lockdowns has given the world an exciting prospect to develop beyond what we dared to imagine possible, and this applies equally to The University of Liverpool Law Review. To unlock this potential the efforts of many people, who have volunteered their time in order to ensure this edition of the Law Review is the best yet, and these people are owed considerable thanks.

I'd like to take this opportunity to thank the Editorial Team for their continued efforts over the last year. They have played a significant role in coordinating the work relating to the Law Review, in working directly with article authors and beyond. Special thanks must also be extended to the members of last year's Editorial Team who provided advice and guidance as we took over their roles.

The academic staff who have also aided in the creation of this edition of the Law Review deserve significant thanks. Their efforts and input in providing specialist advice and feedback has been invaluable. Special thanks to Dr Antal Berkes for his continuous support and encouragement throughout the entire process and for always being readily available to assist us whilst working on the Law Review.

Light must also be shone on the work of the article authors as they undertook to develop and curate their articles ion order to enhance them in readiness for input into the review. Each author has put a countless number of hours in to editing draft articles and without them, there would be no Law Review! Each author, though writing on topics of a great variety, were all united in the common goal of ensuring this edition of the Law Review was of the highest possible standard, and for this they deserve significant praise, and have all of our thanks

Finally, I would like to thank everyone for reading this edition of the Law Review. Knowing that there is such great support has inspired all of the work that has gone into this edition.

Christopher Deacon

*Deputy Editor-in-Chief, University of Liverpool Law Review 2021-2*

# Dragging Sex Work Out of The Shadows and into The Light: Reforms to Outdated, Discriminatory Regimes.

*Amelia Smith*

## Abstract

*Radical feminist perspectives outlined below are prevalent within the UK's legislature and pose harm to vulnerable sex workers: the overwhelming opinion of legislatures is that prostitution is inherently oppressive. This article addresses the governmental approach within England and Wales in which relays outdated perspectives on gender equality to a degree that results in inconsistent implementation. A strict liability approach is ill-suited to the context of exploitation within sex work, particularly that of prostitutes, hence, this article proposes it be reduced and covered by other criminal offences. The approach adopted in New Zealand, although not perfect, provides the best model in which our jurisdiction ought to adopt to improve social justice. This article determines that sex work ought not to be left in the shadows, it is time to recognise this form of labour in order to effectively protect the vulnerable.*

## Introduction

This article critically discusses the implications of law regarding sex work and argues that specific reforms should be adopted within the UK. Discussing the current legislative framework, this article will support the view that radical feministic perspectives produce outdated legislature that is inherently ill-informed to the livelihood of some women.[1] Further, it will be demonstrated that ignorance to prostitution is evident within the current legal framework. Given the inconsistent implementation of the current strict liability offence, this article supports the argument in favour of the adoption of accountability through the offence of rape. Through comparative analysis of the approach taken in other jurisdictions, this article will question the relevance of the data provided by Sweden and support the initiatives presented by the New Zealand government. Endorsement of this framework will hence provide higher rates of success in the UK, dragging sex work out of the stigmatic shadows it currently festers in.

## Current legislative framework

Sex work in England and Wales is not *contra legem* per say, where consent is provided between adults. However, a range of offences shape the law: soliciting in the street or public place for the purposes of prostitution;[2] soliciting another in the street or public place for the purposes of obtaining sexual services as a prostitute;[3] inciting or controlling prostitution for gain;[4] payment

[1] Keith Soothill and Teela Sanders, 'Calling the tune? Some observations on Paying the Price: a consultation paper on prostitution' (2004) 14(4) J. Forensic Psychiatry Psychol, p642.
[2] Street Offences Act 1959, s 1.
[3] Sexual Offences Act 2003 (SOA 2003), s 51A.
[4] Sexual Offences Act 2003, ss 52 and 53.

of a prostitute subjected to force through a third party;[5] and the management or assistance of brothels.[6]

Historical developments leading to the current legislative framework traditionally consisted of a liberalist agenda centring on nuisance. From an academic perspective, in terms of influencing the law, Mill drew focus to the harm principle - only actions that cause harm would be criminalised,[7] protecting individual autonomy. Further, following Wolfenden,[8] the public/ private divide regulated a realm of private morality. Considering these developments, within the modern era, influences of radical feminism are evident, where prostitution is a gender-based violence resulting from patriarchy.[9] As such, the Policing and Crime Act 2009 (PCA 2009) was introduced, concentrating on the eradication of prostitution due to an increase in profile of trafficking, falling within a zero-tolerance ethos.

Prostitution is a highly gendered phenomenon – the role of men is inadequately considered. Where minimally represented, society fails to recognise their vulnerability, perceiving them as 'delinquent.'[10] During policy developments within the legal sphere, although noting their existence, there was no 'substantive analysis regarding issues for male sex workers.'[11] Further, current law ignores autonomy, focussing on false consciousness that women cannot see the realities of their oppression, discrediting the actuality that some, 'make rational choices to earn money by providing sexual services.'[12] No distinction between voluntary and forced prostitution portrays an outdated, deterministic and essentialist perception on women.

## Ignorance to prostitutes

The PCA 2009[13] introduced s.53A, targeting the purchaser. From a radical feminist viewpoint, men define women's sexuality and sexuality defines women, fuelling the industry.[14] Exploitative conduct, *prima facie* appears liberalist, drawing upon 'notions of consent and autonomy.'[15] Nevertheless, the Home Office broadened the definitions of coercion and threats to include situations such as halting the supply of drugs/ alcohol and exploitation vis-à-vis immigration status,[16] heightening the perception that all migrating women are 'trafficked into prostitution by false promises.'[17] This broad definition reflects the abolitionist rhetoric,

[5] SOA 2003, s 53A.
[6] Sexual Offences Act 1956, ss 33 and 33A.
[7] John Stuart Mill, *On Liberty* (Penguin Books Ltd, 1982) p13.
[8] Law Commission, The Wolfenden Report of the Committee on Homosexual Offences and Prostitution (Law Com No 247, 1957).
[9] Catharine Mackinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) 7(3) Signs 515, p519.
[10] Justin Gaffney, 'A co-ordinated prostitution strategy and response to Paying the price – but what about the men?' (2007) 6(1) Safer Communities p27, p28.
[11] ibid, p27.
[12] Soothill and Sanders (n 1) p653.
[13] Police and Crime Act, s 14.
[14] MacKinnon (n 9) p531.
[15] Anna Carline and Jane Scoular, 'Almost Abolitionism: The peculiarities of prostitution policy in England and Wales' in Ellis Ward and Gillian Wylie (eds), *Feminism, Prostitution and the State* (Routledge 2017) 103, p111.
[16] Home Office (2010) *Home Office Circular 006/2010: Policing and Crime Act 2009 – New Prostitution Provisions*. London: Home Office, para 19 and 20.
[17] Belinda Brooks-Gordon, 'Clients and commercial sex: reflections on Paying the Price: A Consultation Paper on Prostitution' [2005] Crim L.R. p425, p432.

eschewing the complexities of the life of a prostitute such as restrictive immigration practises and structural, economic and material inequalities.[18]

Per contra, Munro notes that such an expansive definition of exploitation benefits to acknowledge the difficult experiences suffered.[19] Nevertheless, upon analysing prior policy documents, the use of 'commercial sexual exploitation'[20] was employed as a synonym for prostitution, proposing inherent exploitation and victimisation. Radical Feminism is hence promoted to the exclusion of other feminist perspectives in which conceptualise prostitution as labour.[21]

## Strict liability

The SOA 2003 outlines situations irrelevant to exploitation: whether a purchaser 'ought to be'[22] or need be 'aware'[23] of force imposed. Within policy development, Parliament's radical feminist rhetoric is overwhelming, with the notion that a strict liability offence is required to 'effectively deter clients' being clearly evident.[24] Intending the purchaser contemplates how their behaviour funds the sex industry and perpetuates exploitation of women, the contention to act with 'vigilance and circumspection'[25] and remain 'responsible for their actions'[26] is conveyed. Exploitation is premised upon an assumption that men who buy sex are ignorant to the realities of the sex industry, stigmatising that men are 'dangerous abusers who damage women through purchase of sex,' objectifying them.[27] Men purchasing sex are not homogenous: whilst some are misogynistic, many purchase 'not wanting sex,' but because they're lonely, want advice or comfort.[28] To assume that the majority of clients are ignorant to the law fails to acknowledge the difference in class of the purchaser, reflecting outdated ideologies.

Chambers proposes that 'clients may be deterred from reporting suspected exploitation' due to fear of arrest.[29] Prostitutes are left open to increased harm, vulnerable within intimate contexts.[30] Indeed, the imposition in lieu of context acts contrary to the basic principles of criminal law requiring fault,[31] being contested that this purely extends the 'states coercive

[18] Rutvica Andrijasevic, *Migration, Agency, and Citizenship in Sex Trafficking* (Palgrave Macmillan 2010).
[19] Vanessa E Munro, ''An Unholy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales' (2010) 63(1) Current Legal Problems p45, p58.
[20] Home Office, 'Tackling the Demand for Prostitution: A Review' (Home Office, 2008) p9.
[21] Carline and Scoular, 'Almost Abolitionism' (n 15) p107.
[22] SOA 2003 (n 3) s 53A(2)(b).
[23] ibid.
[24] Carline and Scoular, 'Almost Abolitionism' (n 15) p111.
[25] Policing and Crime HC Bill (2008-09) [13] para 25.
[26] ibid.
[27] Belinda Brooks-Gordon, *The Price of sex: Prostitution Policy and Society* (Willan, 2006) p165.
[28] Tracey Sagar, Debbie Jones, Katrien Symons and Jo Bowring, 'The Student Sex Work Project: Research Summary' (2015) Swansea University Research Summary http://www.thestudentsexworkproject.co.uk/wp-content/uploads/2015/03/TSSWP-Research-Summary-English.pdf accessed 20th January 2022.
[29] Laura Graham, 'Governing Sex Work Through Crime: Creating the Context for Violence and Exploitation' (2017) 81(3) J. Crim. Law p201, p215.
[30] ibid.
[31] David Archard, 'Criminalising the Use of Trafficked Prostitutes: Some Philosophical Issues' in Vanessa E Munro and Marina Della Giusta (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitutes* (Routledge 2016) 149, p151.

reach,'[32] that stories of victimised women informing this genre of radical feminism have been strategically deployed to support increased intervention.[33] Academics have noted that where politicians face new crises, they instinctively recommend new offences.[34]

Further, it has been questioned whether this low-level offence ought to address considerable harm – arguably the offence of rape would prove successful.[35] Archard notes that acquiring the knowledge of force requires deductive steps, including successful nationality identification and an appreciation they're being trafficked into sexual slavery - 'a man who used a trafficked prostitute need not be acting in an unreasonable belief that she was offering her services freely.'[36] Moreover, the Council of Europe specifies that to criminalise, users 'cannot be penalized if unaware'[37] of trafficking status. Strict liability results in incongruity (maximum fine of £1000) which, upon application of rape, could increase punishment for those intentionally having sexual relations with a prostitute known to be forced.

No evidence has been provided to support the contention that legislation effectively deters - application of the offence is inconsistent. Research denoted that s.53A was not used by most police forces (81%), reflecting reluctance amongst the police to use criminal law when dealing with trafficking.[38] Examination displays a momentous lack in trafficking awareness and demonstrate a multitude of examples whereby the police charge victims of trafficking with immigration related offences.[39] A limited use in the offence has been proposed to emanate from misapplication with other SOA 2003 offences and a lack in cases involving the requisite exploitation.[40]

## Decriminalisation – protecting the vulnerable

This article ultimately determines that decriminalisation will appropriately tackle challenges faced by prostitutes. However, to protect the vulnerable, exploitation laws ought to be in place. Looking towards supplementary jurisdictions preventing sex trafficking, Sweden attains the right of non-nationals to enter, reside and work in Sweden, given they support themselves/ have not previously supported themselves through 'honest means,'[41] leaving migrant prostitutes marginalised, vulnerable to harm, fearing deportation. The Swedish government has been 'unable prove that the law has … stopped trafficking,'[42] proving data reflection difficult as within their perception, trafficking and migrants voluntarily engaging in prostitution are one

[32] Anna Carline and Jane Scoular, 'A Critical Account of a 'Creeping Neo-Abolitionism': Regulating Prostitution in England and Wales' (2014) 14(5) CCJ p608, p612.
[33] Vanessa E Munro and Jane Scoular, 'Harm, Vulnerability, and Citizenship: Constitutional Concerns in the Criminalisation of Contemporary Sex Work in the UK' in R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, Victor Tadros (eds), *The Constitution of Criminal Law* (Oxford University Press 2013) p42.
[34] Andrew Ashworth and Lucia Zender, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 Criminal Law and Philosophy p21.
[35] Carline and Scoular, 'A Critical Account of a 'Creeping Neo-Abolitionism' (n 32).
[36] Archard (n 31) p151.
[37] Council of Europe, 'Council of Europe Convention on Action Against Trafficking in Human Beings' (2005) CETS No.197 https://rm.coe.int/16800d3812 accessed 21st January 2022.
[38] Sarah Kingston and Terry Thomas, 'The police, Sex Work, and Section 14 of the Policing and Crime Act 2009' (2014) 53(3) Howard J. Crime Justice p225, p262.
[39] ibid, 264.
[40] ibid.
[41] Aliens Act 2005 s 2(2).
[42] Ann Jordan, 'The Swedish Law to criminalise clients: A failed experiment in social engineering' (2012) NSWP https://www.nswp.org/sites/default/files/Issue-Paper-4%5B1%5D_0.pdf accessed 20th January 2022.

and the same - in need of rescue.[43] Clausen notes that data conducted on the sixth NCID report misrepresented that constant trafficking numbers in recent due to criminalisation.[44] Hence, it is not clear whether 'the increase in information flow and figures represent an actual increase in the level of trafficking, or … an increased knowledge about a rather stable situation.'[45] Caution must be applied when considering this misrepresentative data. Reports demonstrate that even though there may be a decrease in trafficking, 'activities are being diverted to other countries'[46] as the Swedish market is less profitable. As such, a claim 'that criminalisation has had positive effects in limiting the trafficking in women for prostitution to Sweden'[47] implies criminalisation contributed to combatting trafficking overall, something that cannot be sustained.[48] Regarding a more permissible approach, New Zealand experiences similar issues. No visa can be granted to someone who has/ intends to provide commercial sexual services,[49] moreover, a temporary visa holder must not provide sexual services.[50] Hence, 'migrant workers remain largely 'underground' due to their compromised legal status … visibility can put them at risk of violence and deportation.'[51] Although findings note that 'decriminalisation does not increase instances of trafficking,'[52] migrants remain living without the access to justice that residents hold, living within a 'broader system that stigmatises and marginalises.'[53] Although, whilst the Prostitution Reform Act 2003 does not uphold the rights of migrant sex workers, 'if a migrant is deported for engaging in sex work they are not deported for a criminal offence,'[54] hence, decriminalisation moderately reduces the risk of negative consequences if deported to their home country.[55] In the interest of the most vulnerable within society, the offence of rape would efficiently ensure safe practises, as deterrence to alert officials of exploitation would cease.

Within Sweden, the focus of criminalisation is on the purchaser - Ekberg rationalises the neo-abolitionist approach, that the objective is to 'create a society where women … could live full lives free from male violence.'[56] The Skarhed report pertains the Swedish government deem prostitution as a gender-based violence, as such prostitution, migrant sex work, and trafficking

[43] Vincent Clausen, 'An Assessment of Gunilla Ekberg's account of Swedish prostitution policy' (2007) https://www.researchgate.net/profile/May-Len-Skilbrei-2/publication/319300224_The_Swedish_Sex_Purchase_Act_Where_Does_it_Stand/links/59a4a3f70f7e9b4f7df37f65/The-Swedish-Sex-Purchase-Act-Where-Does-it-Stand.pdf accessed 19th January 2022.
[44] ibid, p15.
[45] Clausen (n 43) p15.
[46] Clausen (n 43) p16.
[47] ibid.
[48] Clausen (n 43) p16.
[49] Immigration Act 2009 (IA 2009) s 19(1).
[50] IA 2009 s 19(2).
[51] NSWP, 'How Sex Work Laws are Implemented on the Ground and their Impact on Sex Workers: Aotearoa New Zealand Case Study' (2014) https://www.nswp.org/sites/nswp.org/files/sex_work_legal_case_study_-_aotearoa_new_zealand.pdf accessed 19th January 2022, p4.
[52] ibid.
[53] NSWP (n 51) p4.
[54] ibid.
[55] NSWP (n 51) p5.
[56] Gunilla Ekberg, 'The Swedish Approach to Prostitution and Trafficking in Human Beings through a Gender Equality Lens' in John Winterdyk and Jackie Jones (eds), *The Palgrave international handbook of Human Trafficking* (Palgrave Macmillan, 2020), p577.

are one and the same.[57] Hence, upon discussing 'trafficking,' it is not possible to distinguish which area it regards, therefore making the 'already unreliable statements made by the government even more problematic.'[58] Further, Ekberg misleads the nation, that a decrease in prostitution 'was an outcome of some moral or normative effect of the law,'[59] providing false advertisement to mimicking countries.

Jordan notes that criminalisation has 'forced women to move to more hidden and thus potentially dangerous locations.'[60] Further, possessions, such as condoms 'can be confiscated as evidence'[61] by police, increasing the risk of prostitutes engaging in unsafe sex, more susceptible to 'sexually-transmitted infections and HIV.'[62] Conversely, within New Zealand, the PRA 2003 creates a framework that safeguards human rights of prostitutes,[63] protection from exploitation,[64] promoting the welfare of occupational health,[65] promoting the safety of prostitutes [66] and is conductive to public health.[67] The NZPC provides a free clinic for prostitutes, to 'get information about safety.'[68] Furthermore, all 'workplaces, including sex work workplaces are subject to the same health and safety laws and human rights laws,'[69] where the human rights commission may investigate harassment or discrimination for those self-employed.[70] Promoting safe sex protects prostitutes' health, improving the stigma within society. Results from Aotearoa demonstrate the impact of decriminalisation being 'positive and broad'[71] – relationships between prostitutes and police improves,[72] meaning those subjected to harm are less fearful to seek help from authorities. 'Most workers reported a greater sense of safety … and an increasing belief that their rights would be upheld by the system,'[73] reducing prostitute's status as social outcasts portrayed within criminalising countries.

As such, it is arguable that the law should be reformed to embody a model in which is more akin to the approach seen in New Zealand, decriminalising the practise and purchase of prostitution. Legal transplants provide a remedy to the socio-legal gaps between legislations, offering 'desirable social or legal changes.'[74] Given both countries are of historical and cultural similarity intrinsic to law-making (as both are in the commonwealth), New Zealand, although not perfect, provides the best direction for the UK's jurisdiction.

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[57] Swedish Institute, 'The Ban against the Purchase of Sexual Services. An evaluation 1999-2008' (2010) https://ec.europa.eu/anti-trafficking/ban-against-purchase-sexual-services-evaluation-1999-2008_en accessed 22nd January 2022.
[58] Jordan (n 42), p3.
[59] Clausen (n 43), p3.
[60] Jordan (n 42), p10.
[61] ibid, p12.
[62] ibid.
[63] Prostitution Reform Act, s 3(a).
[64] ibid.
[65] ibid, s 3(b).
[66] ibid.
[67] Prostitution Reform Act (n 63) s 3(c).
[68] NSWP (n 51) p5.
[69] ibid.
[70] NSWP (n 51) p5.
[71] ibid.
[72] NSWP (n 5) p5.
[73] ibid.
[74] Otto Kahn-Freund, in "On Uses and Misuses of Comparative Law" (1974) 37 *Mod L Rev* 1, p17.

## Conclusion

The government within England and Wales continues to conflate exploitative and voluntary sex work, providing excuses for criminalisation with false hopes of counteracting sex trafficking. Such legislation has harmful effects, providing threatening conditions for prostitutes and serving as a catalyst to reducing stigma. No form of legislation will fully combat the issues resulting from prostitution; however, New Zealand's model provides the most support to prostitutes, promoting sexual health, readily implementable through legal transplants. Hence, decriminalisation is the most efficient way in protecting the vulnerable and promoting social justice.

# Do The "Big Five" Technology Companies Stifle Competition Through Leveraging, Violating EU Competition Laws?

*Delisha Dadrewalla*

## Abstract

*EU Competition Law promotes the maintenance of competition within the European Single Market by regulating anti-competitive conduct by companies to ensure that they do not engage in unilateral conducts that could harm society interests. Companies like Apple, Amazon, Facebook, Google, and Microsoft ("Big Five") have revolutionised the economy benefiting billions of people around the world. Big technology companies have advantages such as creating ways to help consumers to connect with people globally. Online Platforms like Google and Microsoft have allowed people to operate remotely especially during the pandemic where consumers have connected online. However, the key theme throughout this dissertation is whether the 'Big Five' companies operate appropriately and fairly within the European Single Market or are using leveraging to stifle and distort competition that could prevent other competitors to grow. The central debate is whether big technology companies violate EU Competition Laws. In addition, the dissertation will consider the possibility of new reforms to prevent unfair competition from occurring in the future. Overall, the dissertation will conclude that the "Big Five" technology companies use leveraging to stifle competition which violates EU competition laws.*

## Introduction

The purpose of EU competition law is to maintain competition in the European Single Market. It is one of the key processes towards the formation of a single market.[1] The main concern within competition law is ensuring that firms who operate in the free-market economy, do not prevent the market from functioning optimally by acting anti-competitively.[2] The main theme throughout this essay in particular is regarding whether the 'Big Five' companies (Google, Facebook, Microsoft, Apple and Amazon) use leveraging as a form of abuse of dominance to stifle and distort competition. This thesis will be considering four connected matters. The first matter of discussion is looking at the background and theoretical framework of the EU competition law and the difficulties within the EU competition law for dealing with anti-competitive practices such as distortion or abuse of dominance. Secondly, exploring the theory of leveraging and how it is used to stifle and distort competition. It is also important to consider that leveraging is an infringement of Article 102 TFEU which is aimed at preventing undertakings who hold a dominant position in a market from abusing that position.[3]

The third matter is in relation to whether the 'Big Five' technology companies have created a massive impact on the economy and people worldwide. However, those companies have also received a lot of scrutiny over the issue of leveraging, manipulating customers and distorting the competition which allows them to remain dominant within several markets. Companies

[1] Narcissa Balta, Juan Delgado' Home Bias and Market Integration in the EU' (2009) 55(1) *CESifo Economic Studies* 110, p113.
[2] Alison Jones, Brenda Sufrin and Niamhe Dunne, 'EU Law' (7th OUP 2019) p1.
[3] Consolidated Version of the Treaty on the Functioning of the European Union, [2008] OJ C 326/89, art 102.

leverage their dominance in one market to improve their competitive position in another. The final matter is whether EU Competition Law can be reformed to prevent Big Technology Companies from distorting competition. To conclude on this debate, the dissertation will demonstrate that the "Big Tech" companies do violate EU Competition Laws with the use of leveraging.

## EU Competition Law

The Treaty on the Functioning of the European Union (TFEU) contains rules that are aimed at preventing restrictions and distortions of competition through anti-competitive conduct. [4] Competition plays a significant role to ensure that companies can conduct business on a level playing field to provide a greater variety of products and services to consumers at competitive prices and conditions.[5] This is perspective is agreed by Huemer that more competition at a firm level can enhance the overall welfare through higher productivity.[6] The main idea of competition law is to provide businesses with a level playing field while ensuring that anti-competitive behaviour does not occur through undertakings in dominant positions or through joint conduct (i.e. cartels). The discussion of EU competition law will be focusing on firstly the details on the background and theoretical framework of EU competition law which will entail looking at the aims and objectives of EU competition law. The second part of the discussion will be involved with considering the difficulties of EU competition law when dealing with the infringement of Article 102 TFEU[7], abuse of dominance. As a result, anti-competitive conduct could enable dominant companies to provide products and services in an unfair manner to stifle the competition which leads to a violation in EU Competition Laws.

## Background and Theoretical Influences of EU Competition Law

Competition Law was established to address the issue relating to the restriction on anti-competitive behaviour which was conducted by private or corporate firms.[8] The main intention behind EU competition law was to prevent anti-competitive practices.[9] The two important aims of the EU competition law are market integration and consumer welfare. The ideas of market integration is a central mission of EU competition law and explains how different markets are connected to each other.[10] Furthermore, market integration policies increase productivity in a dynamic competitive framework.[11] Therefore, the degree of competition is enhanced by market integration and further productivity.[12] Market Integration is acknowledged as a goal of EU

[4] Radostina Parenti, 'Competition policy Fact Sheets on the European Union (*European Parliament*, October 2021) https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy accessed 13th January 2021.
[5] European Court of Auditors, 'Enforcement of EU competition policy' (*European Court of Auditors*, September 2018) https://www.eca.europa.eu/Lists/ECADocuments/BP_COMPETITION/BP_COMPETITION_EN.pdf accessed 7th November 2021.
[6] Huemer Stefan, Beatric Scheubel, Florian Walch, 'Measuring Institutional Competitiveness in Europe' (2013) 59 CESifo Economic Studies 576, p604-606.
[7] Consolidated version of the Treaty on the Functioning of the European Union C326/89, art 102.
[8] Anestis S Papadopoulos, 'The role of the competition law and policy of the EU in the formation of international agreements on competition' (*LSE*, 1st January 2008) http://etheses.lse.ac.uk/2959/1/U615911.pdf accessed 18th January 2022.
[9] Marcin Szczepański, 'EU Competition Policy Key to a fair single market (*European Parliament*, October 2019) https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/642209/EPRS_IDA(2019)642209_EN.pdf accessed 13th January 2022.
[10] Giovanni Notaro, European Integration and Productivity: Exploring the Gains of the Single Market [2002] London Economics 1, p8.
[11] ibid.
[12] Notaro (n 10), p10.

competition law which is highly scrutinised. The second aim of EU competition law is economic efficiency with a consumer welfare standard which is described as the core aim of EU Competition law where individuals benefit from the consumption of goods and services. Ultimately, competition law policies are to ensure, that companies compete fairly, reduce prices, and improve quality for consumers.[13] Therefore, the competition policy ensures that consumers are not hit hard by abusive market practices which are caused by dominant companies that influence competition and could make consumers suffer.[14]

**Aims of EU Competition Law**

To understand the background of EU competition law, it is important to consider the aims of EU competition and why they are significant. The first standard to measure economic efficiency of EU competition law is consumer welfare. Consumer welfare refers to the individual welfare which is defined from an individual's own consumption of goods and services.[15] The main purpose of consumer welfare is to protect competition in the market to enhance consumer welfare and to make sure an efficient allocation of resources.[16] For example, the General Court in the judgment of *Österreichische Postsparkasse* stated that "the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the welfare of consumers."[17] The General Court seems to agree that economic efficiency leads to consumer welfare. Almunia (2010) agreed that "consumer welfare is at the heart of EU policy and its achievements drive our priorities and guides our decision."[18] Therefore, it reinforces the ideas that consumer welfare is the core aim of EU competition law and has been put in place to prevent harm from anti-competitive conduct.

As a result, consumer welfare remains protected from unfair competition. Geradin (2004) takes into consideration the context of abuse of dominance cases where the ECJ has acknowledged that conducts by dominant firms are not easily justifiable under efficiency consideration.[19]

The idea of efficiency is where competition law is implemented that strives to make certain that 'markets function properly and that it benefits consumers the efficiency and productivity resulting from effective competition between undertaking.'[20] This demonstrates that efficiencies plays a significant part in the application of Article 102 TFEU with the objective to protect competition on the market. The provision Article 102 TFEU is directly effective

[13] European Commission, 'Why is competition policy important for consumers?' *(European Commission)* https://ec.europa.eu/competition-policy/consumers/why-competition-policy-important-consumers_en accessed 14th January 2022.
[14] ibid.
[15] R. S. Khemani and D. M. Shapiro, 'Glossary of Industrial Organisation Economics and Competition Law' (*OECD*, 1993) http://www.oecd.org/dataoecd/8/61/2376087.pdf accessed 14th January 2022.
[16] N. Kroes, 'European Competition Policy: Delivering Better Markets and Better Choices' (*Speech at European Consumer and Competition Day*, 15th September 2005) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512 accessed 14th January 2022.
[17] *Joined Cases T-213/01 and T-214/01, Österreichische Postsparkasse v Commission* EU: T:2006:151, para 103.
[18] J. Almunia, 'Competition and Consumers: The Future of EU Competition Policy' *(Speech at European Competition Day European Commission*, 12th May 2010) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_233 accessed 14th January 2022.
[19] Damien Geradin, 'Efficiency claims in EC Competition law and sector-specific regulation' (8th November 2004) http://ssrn.com/abstract=617922 accessed 8th December 2021, p9.
[20] Ariel Ezrachi, ' EU Competition Law Goals and the Digital Economy' (2018) O.J.L.S 1, p27.

which prohibits traders from engaging in unfair commercial practices toward consumers which fall within EU competition law on unfair trading practices but is a separate area of law. Furthermore, the role of efficiency is also recognised under Article 102 TFEU which aims to prevent abusive conduct and therefore preventing harmful effects on consumers.[21]

A second important aim is market integration which is a central mission of the EU and is defined as the formation of a single market. Erzachi views that according to the European Commission, competition within the market is protected as way of enhancing consumer welfare and an allocation of resources.[22] As a result, the European Commission has underlined the significance of market integration, which encourages resource allocation for the benefit of consumers.[23]Overall, competition law has a role to support an effective market integration which depends on how effective the regulatory system is exercised and that market integration policies are implemented to positively help increased productivity within a competitive structure.

The third aim of EU Competition Law is maintaining an effective competitive structure.[24] Ezrachi viewed that the European Courts have held that competition law is not just targeted at practices that may cause damage to consumers directly but is also aimed at practices which could have a negative impact on the effective competition structure and could be detrimental to the consumer.[25] In *Konkurrensverket v TeliaSonera Sverige*, the Court highlighted the significance of preventing competition from being distorted to the "detriment of the public interest, individual undertakings and manipulating consumers."[26] Therefore, the Court seems to be indicating towards broader aims than the General Court. As a result, maintaining an effective competitive structure is essential to ensure the welfare of the European Union.

A fourth aim is fairness reflecting on the interpretation of the concept of consumer welfare. The main objective of fairness is shown in Article 102 TFEU which explicitly states that abuse of market dominance can directly or indirectly implement the imposition of unfair purchasing and trading conditions which are imposed on consumers.[27]

It is important to differentiate between exploitative and exclusionary abuse within Article 102 TFEU. Gal explains the concept of exploitative abuse where a company engages in anti-competitive conduct which are imposed by dominant companies having a "special responsibility" due to their advantageous position in the market.[28] Therefore, this viewpoint shows that anti-competitive conduct includes discriminatory pricing where the price to the highest-paying customers could be contemplated as exploitative.[29] Whereas exclusionary abuse

[21] Consolidated version of the Treaty on the Functioning of the European Union, [2008] OJ C 326/89, art 102.
[22] (n 20) p27.
[23] ibid.
[24] (n 20) p29.
[25] ibid.
[26] *Case C-52/09 Konkurrensverket v TeliaSonera Sverige* EU:C: 2011:83 para 22.
[27] Case 26/75 General Motors Continental v Commission EU:C: 1975:150, para 11.
[28] Michal Gal, 'Abuse of Dominance - Exploitative Abuses' in Lianos and Geradin (eds) Handbook on European Competition Law (Edward Elgar, 2013) 385, p388.
[29] ibid.

includes all the practices such as leveraging that a dominant undertaking may use to prevent others or restrict their options therefore removing or weakening the potential competition.[30] Ezrachi reinforces that fairness is viewed as making sure that equal opportunities exist for efficient competitors and for the protection of consumers.[31] As a result, the perception that fairness is the one of the goals within EU Competition Law is clearly expressed throughout these above authorities.

## The Difficulties Faced by EU Competition Laws

The difficulties faced by EU competition law is in regards with anti-competitive issues like distorting competition and the infringement of Article 102 TFEU.[32] However, the enforcement has been affected by numerous anti-competitive practices such as tying and bundling through behaviour by dominant companies in the market.[33] Pablo states that abusive practices occur due to the presence of a dominant firm where the effective competition is weakened.[34] The connotation of Pablo's[35] explains that the conduct which is considered abusive where the only main objective is anti-competitive. Therefore, despite, the prohibition put into place to protect competition, a form of infringement seems to override EU competition laws.

However, the interpretation of EU competition law can be seen as inconsistent and failing to recognise when dominant firms take abusively take advantage to distort the market competition.[36]This means that the general idea of the need for competition law is to control single-firm abuses whenever companies have achieved a position due to their strong market power.[37] This clearly shows the difficult issues EU competition law has to face because in spite of restrictions put in place to prevent anti-competitive practice, we still see anti-competitive abuse occur due to the dominant firms having strong market power. As a result, this leads to the infringement of Article 102 TFEU and violation of EU competition law.[38]

## Distortion of Competition

Distortion of competition under Article 102 TFEU is based on the idea of perfect competition that is interfered with or abused by a dominant position by one or more undertaking.[39] This is demonstrated in *Tetra Park International SA v Commission of the European Communities* where it is clear that the prohibition is aimed at avoiding distortion of competition that is created by dominant undertaking by applying different prices or other sale conditions.[40] A dominant

30 Eduardo Cunha, 'Types of Abusive Conduct' (*Free University of Berlin*, 17th June 2017) https://wikis.fu-berlin.de/display/oncomment/Types+of+abusive+conduct accessed 14th January 2022.
31 Ezrachi (n 20) p27.
32 Consolidated Version of the Treaty on the Functioning of the European Union, C 326/89, art 102.
33 ibid.
34 Ibáñez Colomo, Pablo, What is an Abuse of a Dominant Position? Deconstructing the Prohibition and Categorizing Practices (10th June 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3864292 accessed 25th November 2021, p1.
35 ibid.
36 Consolidated Version of the Treaty on the Functioning of the European Union, C 326/89, art 102.
37 Marcos P.F, 'The prohibition of single-firm market abuses: US monopolisation versus EU abuse of dominance (2017) ICCLR 338, p345.
38 Consolidated Version of the Treaty on the Functioning of the European Union, C 326/89, art 102.
39 Chirita AD, "A legal-historical review of the EU competition rules" (2014) 63 International and Comparative Law Quarterly 281, p289.
40 Case C-333/94 *Tetra Pak International SA v Commission of the European Communities* EU:C: 1996:436, para 22.

undertaking can cause a huge influence on competition in the EU as it can lead to unfair exploitation or the distortions of competition. Jacobides and Lianos view that the weaker the competition, the more likely that the competition will be distorted, as it allows dominant undertakings to gain the opportunity to entrench their dominance.[41] Therefore, by distorting competition, a dominant undertaking can use its dominance to manipulate in the markets where they are non-dominant.

## The 'Big Five' Use Leveraging In an Abusive Manner

### Theory of Leveraging

The second issue of this essay is the principle behind the concept of leveraging that is part of the abuse of dominance which means utilising one's dominance in one market to gain access to or even foreclose other markets for competitors. This can, for example, be done through tying and bundling which has been fundamentally addressed under EU competition law in the context of abuse of dominance.[42] Tying occurs when a seller requires a buyer to buy a second product when they buy the first and agree to not buy the second product anywhere else.[43] Whereas bundling happens when multiple products are packaged and sold together.[44] Furthermore, tying is mentioned in Article 102(d) TFEU as 'making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'[45] Therefore, by tying one product into the sale or another can be seen as abuse too and being restrictive of consumer choice and depriving competitors. Tying can be demonstrated in *Microsoft vs Commission* resulting in an eventual fine of €497 million for including Windows Media Player alongside the Microsoft Window platforms which were formulated as anti-competitive tying and bundling.[46] Tying results in foreclosing the competition in the operating market. Furthermore, Donoghues perspective of leveraging is that it creates a situation in a dominant market that distorts competition within a neighbouring market.[47] Therefore, Donoghue's viewpoint of leveraging is partially correct because dominant companies like Microsoft undertake abuse of a non-dominated market to strengthen their position in a dominated market.[48] For example, the issue of leveraging occurs within the "Big Five" technologies companies such as Google, Facebook, Apple, Amazon, and Microsoft.[49] This can be an issue as dominant companies can leverage its market power in its primary market to dominate a new market. Therefore, this clearly shows how the "Big Five" technology companies use leveraging to stifle through competition which ultimately impacts consumers, and other potential competition in an unfair manner.

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[41] Michael G. Jacobides and Ioannis Lianos, 'Ecosystems and competition law in theory and practice (2021) 30 Industrial and Corporate Change 1199, p1203.
[42] Stefan Holzemer, 'Tying and bundling in the digital era' (2018) 14 ECJ 345, p347.
[43] Matthew Lane, 'Antitrust in 60 Seconds: Tying and Bundling' (*Disruptive Competition Project*, 23rd April 2019) https://www.project-disco.org/competition/042319-antitrust-in-60-seconds-tying-bundling/ accessed 18th January 2022.
[44] ibid.
[45] Consolidated version of the Treaty on the Functioning of the European Union, [2008] OJ C 326/89, art 102(d).
[46] *Case T-201/04 Microsoft Corporation v Commission of the European Communities* EU: T: 2007:289, para 45.
[47] Robert Donoghue and Jorge Padilla, *The Law, and Economics of Article 102 TFEU* (3rd edn, Hart Publishing 2014) p250
[48] ibid.
[49] Marc Bourreau and Alexandre de Streel, 'Digital Conglomerates and EU Competition Policy'(11th March 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350512 accessed 15th January 2022, p14.

**An Infringement of Article 102 Treaty on the Functioning of the European Union (TFEU)**

The purpose of Article 102 TFEU[50]and how it affects leveraging abuse is an important discussion point within the paper. The primary purpose of Article 102 TFEU is that it prevents the use of abusive conduct by companies that have a dominant position in one market. The European Commission further explains that it deals with the unilateral conduct of undertakings with substantial market power from abusing that position which could affect the inter-Member State trade. One of the main reasons why Article 102 TFEU is particularly important is that it is relevant to leveraging abuse which is an infringement of the treaty by an undertaking active in several markets.[51] The dominant undertakings use their dominant market power to distort competition within other related markets. Donoghue and Padilla reinforce this view who stated being dominant is not itself contrary to Article 102 TFEU.[52]

However, to establish abuse of dominance, it must first be proven that an undertaking holds a dominant position on the relevant market.[53] In *Microsoft v Commission*, the Commission had correctly established that the adoption of alternative formats constituted of a media player, a significant deterrent for media content providers against producing content in different standards, which resulted in an example of tying.[54] Therefore, this is an example of a dominant company committing abuse in a non-dominated market that is related to and connected with the dominated market.[55] In this case, the European Courts held that product integration could be tantamount to contractual tying and therefore it might be considered an abuse of market dominance.[56] Overall, the case shows that leveraging abuse can distort competition for the non-dominant market. This is an infringement of Article 102 TFEU as it is a way of abusive conduct which leads to the violation of EU Competition Law.

**Big Technology Companies Using Leveraging to Stifle Competition Violating EU Competition Law**

Technology companies have created a massive impact on the world's economy especially digital economy which is based around connectivity. The 'Big Five' technology companies have shaped the way society has progressed and have gained dominance in their respective fields because they understood their markets and how to satisfy customers' needs.[57] However, the 'Big Five' have received a lot of scrutiny over the use of leveraging and how big technology companies manipulate consumers and distort competition to allow them to remain dominant in markets. The third issue of this dissertation as a whole is to consider whether the 'Big Five' technology companies such as Google, Apple, Amazon, Facebook, and Microsoft do stifle or distort competition and violate EU Competition Laws. Through this next section, the paper will discuss a few case studies on Google and Amazon to demonstrate that the 'Big Five' technology companies do violate EU Competition Law.

[50] Consolidated version of the Treaty on the Functioning of the European Union, [2008] OJ C 326/89, art 102.
[51] ibid.
[52] (n 47) p250.
[53] ibid.
[54] A Andreangeli 'Case note on T-201/04, Microsoft v Commission, Judgment of 17th September 2007' (2008) 45 Common Market Law Review 864, p877.
[55] Donoghue (n 47) p250.
[56] Microsoft Corporation v Commission (n 46) para 47.
[57] Tech Slang' 'The Big Five Tech Companies: How Did They Make It Big?' (*Tech Slang*, 28th May 2021) https://www.techslang.com/the-big-five-tech-companies-how-did-they-make-it-big/ accessed 21st December 2021.

## Case Studies

### Google

Google is a multinational technology company that specialises in internet related services and has been excelling in providing premium hardware products such as the Google Pixel.[58] Google as a company has created a positive impact on society as it makes gaining and spreading knowledge much easier. Diez shows a positive perspective of Google being a successful model due to its dominance in the search engine market.[59] Furthermore, trader ads are linked to Google's horizontal platforms and the dominance of the company can leverage from one side to other markets. Google may be impacting society in a positive way in the search engine market. However, Diez expresses that there is a key concern about Google using its dominant position to jeopardise the aims and objective of the EU Competition Law as it could reduce competitors' incentives to invest in the creation of original content. [60] The reason the reduction of potential competitors is because Google has abused its dominant position in the markets for general internet search services in the European Areas by systematically favouring its own comparison-shopping product in Google's general search result page. The Commission's initial view is that such conducts leads to infringements of EU competition rules as it stifles competition and harms consumers.

The European Commission claims that Google as a dominant market player is abusing its power by using it to their advantage to prevent other rival competitors from rising. [61] This is evident in *Google v Commission* which was an infringement of Article 102 TFEU by Google abusing its dominant position on the online search market.[62] This was reinforced in 2019, the European Commission has previously fined Google €4.43 billion for three separate breaches of competition law which are first illegally tying of Google's search and browser apps.[63] Second, Google has faced multiple breaches for anti-competitive conduct such as for making illegal payments on exclusive pre-installations of Google Search and thirdly for illegally obstructing the development and distribution of competing Android operating systems.[64] This is an example of infringement by Google making illegal payments and causing distortion in several competitive markets.

This is again replicated in a recent case *Google LLC v European Commission* where it was held that the European Commission had incorrectly found harmful effects on competition as the Commission had not established that Google's conduct had even potential anti-competitive effects on the market search. However, it is further disputed that Google's conduct was abusive and the unequal treatment resulted from Google's comparison-shopping service which had a

[58] ibid,
[59] Fernando Diez, 'Promoting Competition in Digital Markets; A Case Against the Google Case, and the Futile Search of 'Neutrality' in On-Line Searches' (15th November 2015) http://dx.doi.org/10.2139/ssrn.2691058 accessed 25th November 2021.
[60] ibid
[61] Diez (n 59).
[62] *Case C-507/17 Google Inc. v Commission* EU:C: 2019:15, para 79.
[63] European Commission, 'Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine' (*European Commission*, 18th July 2018) https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 accessed 7th January 2022.
[64] ibid.

negative effect on the competition for comparison-shopping services.[65] To conclude, Google has breached Article 102 TFEU with leveraging, for example illegal tying which is an infringement causing distortion in several competitive markets.

**Amazon**

Amazon is a worldwide corporation, and it focuses on e-commerce, cloud computing, digital streaming, and artificial intelligence which is within one of the 'Big Five' companies.[66] Amazon has built such a strong sustainable competitive advantage based on a numerous set of factors such as technology, e-commerce, price, fast delivery and reliable logistics in the consumer services sector. Consequently, having this benefit of gaining market power can lead to a few disadvantages. Amazon is a dominant e-commerce retail market player, and this presents them the advantage to abuse their dominance. For example, Nylen and Lima argued that a small company, PopSockets dealing in phone holders and chargers were not allowed by Amazon to sell through preferred distributors and had to let Amazon set its prices. As a result, PopSockets stopped selling their products through Amazon which shows anti-competitive conduct treatment towards third party sellers. [67] This is demonstrated as a 'Big Tech', company like Amazon using their dominant platform to prevent competitors who also wanted to enter the phone market and therefore the refusal to sell smaller company's products was a way to leveraging or stifle competition. This demonstrates how a 'Big Tech" company like Amazon uses their dominant platform to dictate terms to smaller companies who want to enter the market by stipulating unfair selling terms and as a way to leverage or stifle competition

The issue of leveraging is due to Amazon's dominance in the market. This view is agreed upon by an academic, Skelton (2020) who states that the Commission's preliminary view is that it allows Amazon to leverage its dominance in the market for the provision of marketplaces services in France and Germany which are the biggest markets for Amazon in the European Union.[68] This reinforces that due to Amazon being a dominant player it permits them to abuse their power by stifling competition leading to changes in the internet's biggest marketplace. In addition, Amazon has been implicated in many investigations based on alleged exclusionary abuse by Amazon and discovers how the company can leverage its position as the marketplace owner to sell its products on adjacent markets and exclude third parties and independent sellers.

Another demonstration of this issue is when in 2019 the European Union was investigating whether Amazon used data from independent retailers to gain an unfair advantage. Piovano and Casert stated that this is a decision that could lead to changes in how the internet's biggest marketplace works.[69] The EU opened an initial investigation last year where Amazon had

[65] *Case T-612/17 Google LLC v European Commission* EU: T: 2021:763, para 8.
[66] Tech Slang' 'The Big Five Tech Companies: How Did They Make It Big?' (*Tech Slang,* 28th May 2021) https://www.techslang.com/the-big-five-tech-companies-how-did-they-make-it-big/ accessed 6th January 2022.
[67] Leah Nylen and Cristiano Lima,' Big Tech's 'bully' tactics stifle competition smaller rival tells Congress' (*Politico*, 17th January 2020) https://www.politico.com/news/2020/01/17/big-tech-competition-investigation-100701 accessed 15th January 2022.
[68] European Commission, 'Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices' (*European Commission*, 10th November 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 accessed 10th January 2022.
[69] Carlo Piovano and Raf Casert, 'With Big Tech's dominance under scrutiny, EU probes Amazon' (*AP News*, 17th July 2019) https://apnews.com/article/fa43a4a1d41849e6b6ae8537f7b0b4c7 accessed 7th January 2022.

appeared to use "competitively sensitive information about marketplace sellers, their products and transactions on the marketplace" for collecting data on its platform.[70] This investigation could lead to fines which finally made Amazon cooperate with the European Commission by helping to support and grow all size businesses. This analysis of Amazon wanting to 'help' all size businesses may be seen as an improvement as it avoids the risk of unfair competition. However, the main concern is that Amazon could artificially "push" retailers to use its service due to the support that they are offering.[71] This could potentially go deeper into Amazon's own ecosystem by increasing the number of sellers and therefore, is a form of abuse as the idea allows more benefits and more power for Amazon's own ecosystem.[72] As a result, It ultimately still demonstrates that Amazon as a dominant player can easily find ways to stifle competition violating EU Competition Law.

**Facebook**

Facebook is a multinational technology company and is a top market player in social media markets which build technologies to help people connect with friends, families, communities and grow their business. Seidman stated that Facebook is considered as one of the "Big Tech" or "Big Five" companies.[73] However, Facebook has also been under investigation for violating EU competition rules by gathering advertising data in order to compete with them in markets.[74] For instance, in Facebook v Bundeskartellamt it held that Facebook had abused its dominant position in the German market for social networks.[75] Scharf (2019) clarified that Facebook's behaviour had resulted in an abuse of dominance by using third party websites and merging it with a user's Facebook account.[76] This reinforces that due to Facebook being regarded as dominant company it was therefore not exposed to any substantial competition.[77] There is a better explanation which is viewed by Gormsen and Llanos (2021) who state that the platform can include a privacy policy tying, which is a strategy that Facebook has relied on to protect its dominance to leverage its market power onto other data markets.[78] In addition, Facebook blocks access to essential input to compete with the entrant's innovation and leveraging its user base which creates even more profit for themselves.[79] This anti-competitive strategy falls within

[70] European Commission, 'Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon'(*European Commission,* 17th July 2019) https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291 accessed 7th January 2022.
[71] Margrethe Vestager, 'EU alleges Amazon abused competition rules by using data to gain unfair advantage' (*Euronews*, October 2020) https://www.euronews.com/2020/11/10/eu-alleges-amazon-abused-competition-rules-by-using-data-to-gain-unfair-advantage accessed 7th January 2021.
[72] ibid.
[73] Gwendolyn Seidman, 'The Big 5 and relationship maintenance on Facebook' (2019) 36 Journal of Social and Personal Relationships 1785, p1791.
[74] European Commission, 'Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook' (*European Commission*, 4th June 2021) https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848 accessed 7th January 2022.
[75] *Case C-252/21 Facebook Inc. and Others v Bundeskartellant's OJ C 320,* para 7.
[76] Arno Scharf, 'Exploitative business terms in the era of big data- the Bundeskartellant's Facebook decision' (*Bundeskartellamt*, 7th February 2019) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html accessed 7th January 2022.
[77] ibid.
[78] Liza Lodvdahl Gormsen and Jose Tomas Llanos, 'Facebook's exploitative and exclusionary abuses in the two-sided market for social networks and display advertising' (2021) Journal of Antitrust Enforcement 90, p103.
[79] ibid.

Article 102 TFEU which is an infringement causing harm for other entrant innovations in competition.

**Apple and Microsoft**

Apple and Microsoft are the two other companies within the "Big Five" technology companies.[80] Firstly, Apple is a multinational company that engages in the information technology market and secondly Microsoft is a dominant player in the operating system market. However, both companies have used their dominance to abuse markets and potential competitors. For instance, the European Commission viewed that as Apple has a dominant position in the music streaming apps through the App Store, this could lead to Apple distorting competition in the market for music streaming and if confirmed would be seen as an infringement of Article 102 TFEU that prohibits the abuse of a dominant market position.[81] Also, reinforcing the Microsoft v Commission case where the products were a subject of tying which referred to a situation where customers that purchased the tying product are likewise required to purchase another product from Microsoft.[82] This resulted in an infringement which can harm consumer benefits through tying by foreclosing the market for other products. To conclude, this continues to show how the "Big Five" technology companies can take advantage of network effects to stifle competition.[83] As a result, the negative consequence can occur through the "Big Five" using their dominant market power to leverage in one line of business to gain monopolies or a better position in other businesses and locking consumers into their ecosystem of products and services.[84]

**Reform of EU Competition Laws In Big Technology Companies**

The "Big Five' technology companies have remained dominant in several markets, and this has led to potential harm for other competitors as they are being prevented from rising or showing their innovations due to the leveraging of the "Big Tech' companies into other markets. The EU is aiming to set a rulebook for digital markets and to set standards for "Big Tech" which have been adopted globally by other countries and by large technology firms.[85] The European Commission has drafted a Digital Markets Act (DMA) which would include a set rulebook for the "Big Tech" firms that are required to change their business models in several ways.[86] The aim of the DMA is to control the powers of the big technologies companies as part of a move

[80] Tech Slang' 'The Big Five Tech Companies: How Did They Make It Big?' (*Techslang*, 28th May 2021) https://www.techslang.com/the-big-five-tech-companies-how-did-they-make-it-big/ accessed 6th January 2022.
[81] European Commission, 'Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers' (*European Commission*, 30th April 2021) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061 accessed 7th January 2021.
[82](n 46) para 46.
[83] Antoine Prince Albert III, 'Big Tech, Big Problems, & Big Solutions: The Legislative Package to Reinvigorate Platform Competition' (*Public Knowledge*, 15th September 2021) https://publicknowledge.org/big-tech-big-problems-big-solutions-the-legislative-package-to-reinvigorate-platform-competition/ accessed 18th January 2022.
[84] ibid.
[85] Zach Meyers, 'Can The EU Set A Global Rulebook for Big Tech' (*Centre for European Reform*, 1st June 2021) https://www.cer.org.uk/sites/default/files/bulletin_138_article3_ZM.pdf accessed 7th January 2022.
[86] Niranja Arasaratnam,'Worldwide: Regulation Of Big Tech' (*Mondaq*, 23rd July 2020) https://www.mondaq.com/antitrust-eu-competition-/968948/regulation-of-big-tech accessed 8th January 2022.

to limit anti-competitive practices in the digital economy.[87] Furthermore, the purpose of the rulebook is to ensure fairness for businesses that depend on the largest tech firms, and to give potential competitors more chances of success.[88] Therefore, this demonstrates that the EU have recognised that the "Big Tech" companies are using their dominant position to stifle competition and by having a rulebook for the largest technology companies is a way to allow for equal and fairer competition. The reform needs to produce visible benefits for consumers or businesses to be able to avoid negative consequences so that consumers and lawmakers elsewhere have the same outcome. However, the EU has not always achieved certain objectives such as ensuring that the proposed rules are cost-effective to demonstrate to large technology firms have a reason in avoiding the cost of operating a different business model. Therefore, it is important that these proposed rules are implemented efficiently to prevent the "Big Tech" companies from stifling competition.

## Conclusion

The "Big Tech" companies have impacted billions of people. Companies such as Amazon, Apple, Facebook, Google, and Microsoft have completely transformed the world and they maintain their strong hold on tech supremacy.[89] Furthermore, the response to my thesis is that the "Big Five" or "Big Tech' companies do stifle competition violating the infringement of Article 102 TFEU. This is quite clear throughout the dissertation and how leveraging is a form of abuse of dominance as the "Big Five" use their dominance in one market to gain access to another market. Leveraging can occur through tying where sale of one product is tied with sale of another product which could be considered abuse too as it restricts consumers choice and potential harm competition and prevent other potential competition from rising and create barriers to entry. The solution to this matter is considering forms of reforms which need to be regulated by the EU to ensure that "Big Tech" companies stay within the rules of EU competition laws.

New reform changes towards EU competition law have been implemented like allowing for more fairer competition, requiring Big Tech companies to change their business model and working on the new Digital Market Act. However, "Big Five" technology firms will always find indirect ways to leverage and distort competition and therefore the reforms mentioned above may not prevent the" Big Five" from stifling competition due to their dominance with several markets.

[87] Reuters, 'EU lawmakers agree on rules to target big tech- FT'(*Reuters*, 17th November 2021) https://www.reuters.com/technology/eu-lawmakers-agree-rules-target-big-tech-ft-2021-11-17/ accessed 18th January 2022.
[88] Meyrrs (n 85).
[89] Katie Jones, 'The Big Five: Largest Acquisitions by Tech Company' (*Visual Capitalist*, 11th October 2019) https://www.visualcapitalist.com/the-big-five-largest-acquisitions-by-tech-company/ accessed 8th January 2022.

# The Right to Privacy vs The Interests of Technological Innovation: Reflecting on the Delicate Balance

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## Abstract

*The societal interest in the constant progression of technological innovation must at every stage be carefully balanced with the Right to Privacy. The current law establishes a well-considered balance which favours the Right to Privacy, and thus the Rights of the Individual, whilst allowing significant technological innovation without needlessly hindering its progress. This essay will explore the basis of this law, the balance it strikes and why this balance in its current form is appropriate, then look to the future at proposed legislation which is passing through the Houses of Parliament at the time of writing and critique that the proposals threaten the balance in a way which is not necessarily positive for either side of the equation.*

## Introduction

As far back as 1890, the concept of privacy has been on the minds of legal professionals with the idea of a 'right to be let alone' emerging as an early definition of this right.[1] This concept was adapted in the Universal Declaration of Human Rights as preventing 'arbitrary interference with [a person's] privacy, family, home or correspondence' demonstrating the importance of this Right in one of the earliest Human Rights texts and the inclusion of the word 'arbitrary' showing that even in its earliest conception it was considered an absolute right.[2]

Since this time, new technologies, in particular, e-technologies, have required the law to adapt and to introduce new rules on privacy in relation to modern, electronic forms of communication. This essay focusses on the E-Privacy Directive[3] which is transposed into UK law through the Privacy and Electronic Communications Regulations 2003 (PECR)[4] and upholds the rights in Article 7 of the EU Charter of Fundamental Rights [CFR].[5]

The PECR sits complimentary to UK General Data Protection Regulation 2018 (GDPR) implemented by the Data Protection Act 2018.[6] The PECR's purpose is to regulate electronic communications networks and services, and those providing them, with the effect of setting the standard for respecting the privacy of communications in line with Art.7 CFR. Electronic communications data was not specifically regulated by EU or UK law before the PECR.

[1] Louis D. Brandeis and Samuel D. Warren, 'The Right to Privacy' [1890] 4 Harv Law Rev No 5 193, p193.
[2] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 12.
[3] Directive 2002/58/EC of The European Parliament And Of The Council of 12 July 2002.
[4] Privacy and Electronic Communications Regulations 2003.
[5] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art 7.
[6] Data Protection Act 1998 (as amended).

The regulation centres around the concept of 'consent'. This refers to a 'freely given, specific, informed, and unambiguous indication' given by the user of any regulated services that they agree for their information to be collected and controlled by the networks and services, as well as the providers of such.[7]

In February 2021 Pedro Santos, the Portuguese Minister for Infrastructure and Housing, addressed the Council of the European Union at a meeting on the confidentiality of electronic communications. He was quoted as saying that 'Robust privacy rules are vital for creating and maintaining trust in a digital world.'.[8] This was in relation to a new mandate put forth (updating the E-Privacy Directive) which he believed 'strikes a good balance between solid protection of the private life of individuals and fostering the development of new technologies and innovation'

This concept of balance is crucial to the idea of a non-absolute right to privacy and its seemingly equal and opposite force, the development of new technologies and innovation.

J.J Thompson wrote that the 'right to privacy is itself a cluster of rights', not to be thought of as derivative of other rights but intrinsically linked to them.[9] The right to privacy, its implementations, and its protection are crucial, as a right it is everywhere overlapped by other rights.[10] This protection of the individual and their rights must, however, be balanced fairly with competing rights and interests, including innovating in fields which potentially encroach upon individual privacy. Accordingly, any legislation touching upon these issues must balance a number of competing factors.

This essay will discuss the implementation of the PECR and its effect in protecting the individual's right to informational privacy. It will evaluate how it follows the concepts of Contextual Integrity set out by Nissenbaum, argue that an appropriate balance has been struck which allows privacy to be upheld while fostering innovation in a modern online world, and reflect on how new Government proposals challenge this balance with a discussion on what the future could hold for this ever-developing area of law.[11]

## New Opportunities for Privacy Violations

Academics such as Webber have stressed the importance of consistency when regulating privacy, PECR Reg.2 seeks to provide this by guiding the behaviour and expectations for networks and service providers.[12] One of the expectations set out by the PECR regards informational and decisional violations of privacy, introducing regulation on communications over networks and

[7] EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679, article 4(11).
[8] 'Confidentiality of electronic communications: Council agrees its position on ePrivacy rules' (*Council of the EU Press release,* 10th February 2021) https://www.consilium.europa.eu/en/press/press-releases/2021/02/10/confidentiality-of-electronic-communications-council-agrees-its-position-on-eprivacy-rules/ accessed 10th November 2021.
[9] J.J.Thomson, 'The Right to Privacy' (1975) 4 Philosophy and Public Affairs 295, p306.
[10] Ibid, p312.
[11] Helen Nissenbaum, *Privacy in Context* (1st edn, Stanford Law Books 2009).
[12] Mark Webber, 'The REFIT of the e-Privacy Directive - what can we expect?' [2016] 16(6) P.&D.P. 5, p8.

services. Informational privacy can be understood easily as the privacy relating to information about oneself, whilst decisional privacy rights regard 'the right against unwanted access such as unwanted interference in our decisions and actions,' as opposed to simple information.[13] Although being different, they can be seen as 'part of a mutually reinforcing dynamic—rather than separate types.'[14]

The Court of Justice of the European Union (CJEU) case of *Tele2 Sverige* proved that privacy rights for informational and decisional data were entrenched by the PECR as the CJEU held that Directive 2002/58 (transposed as the PECR), when interpreted in light of Art.7 CFR, precludes collection of 'traffic and location data' as it would violate the individual's right to privacy.[15]

The introduction of clear expectations and rules on the providers of electronic communication networks reflects the public interest for the individual to control which data is collected, drawing a line in the sand for the right to privacy which can only be crossed where the individual consents. However, this cannot be absolute and must be fairly balanced so as to not impede technology and innovation which relies on the collection of data. A popular example of such technological innovation would be social media feed algorithms, a user's data is collected and processed by an algorithm to create a perfect feed which shows them content they will enjoy, undoubtably a substantial innovation but undeniably dependent on the collection of user data. In the instance of social media, a user's consent is what allows this data collection.

It should be noted that a user's data can be gathered without consent where there is a substantial justification. An example of this is given in the *Tele2 Sverige* case where it was found that for the retention of traffic and location data without consent 'only the objective of fighting serious crime is capable of justifying such a measure.'[16] This was following the dicta of *Digital Rights Ireland* which showed that whilst Directive 2006/24[17] provides no criterion for instances which may be 'considered to be sufficiently serious to justify such an interference'[18] with the fundamental rights in Art.7 and Art.8 of the CFR, serious crime could be seen as a justifiable situation. This qualification that the rights under the CFR are not absolute and can be infringed within certain reasonable circumstances is key to establishing the balance of interests as the law must balance the rights of the individual with the overall public interest, the prevention of serious crime falling firmly within the latter.

[13] Marjolein Lanzing, 'Strongly Recommended Revisiting Decisional Privacy to Judge Hypernudging in Self-Tracking Technologies' [2019] 32 Philos. Technol. 549, p551.
[14] ibid.
[15] C-203/15, C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen,* para101.
[16] ibid, para 102.
[17] Directive 2006/24/EC of The European Parliament and Of the Council of 15th March 2006.
[18] C-293/12 and C-594/12 *Digital Rights Ireland v Minister for Communications*, para 60.

**The PECR Presumptive Approach and the Need for Qualification**

The PECR protects first and foremost the rights to privacy of the individual and in doing so places an emphasis on a presumptive approach that there is an obligation placed on the 'service provider' to safeguard security (similar to Art.24(1) implemented by the Data Protection Act 2018 [DPA]).[19] This can be seen through Reg.6(1) where the language used is that 'a person shall not use an electronic communications network to store information, or to gain access to information stored…unless the requirements of paragraph (2) are met.' The service provider needing the meet requirements in this way places the balance in favour of the user, who does not have to meet any requirements in order to benefit from the protection of this regulation and, under the paragraph (2) requirements, is given 'the opportunity to refuse the storage or access to that information.'[20]

The EU handbook on Data Protection itself notes that 'confidentiality of communications is significantly linked to the protection of the right to private life enshrined in Art.7'[21] and that this is shown in practice by unsolicited communications (spam) being prohibited without the consent of the user,[22] a recent example of this is Halfords being fined nearly £30,000 for sending unsolicited marketing emails to customers advertising a government 'Fix Your Bike' scheme.[23] This prohibition on unsolicited communication shows the negative obligations on service provides as they are required to obtain consent first. This concept is the core of the legislation and so the PECR can be seen to favour the individual when balancing rights and innovation as their consent is required in the first instance, without this consent their data is automatically protected by law, this protection then being reinforced by fines and other such punishments.

The qualification to infringe a person's privacy rights under PECR to use their data without their consent must come from authoritative consent,[24] or be strictly necessary,[25] and must always follow the principles of GDPR data processing implemented into the Data Protection Act 1998.[26] An example of this qualification not being met is the European Court of Human Rights case of *Marper* where the individual's right to privacy under the European Convention on Human Rights was seen to have been violated by the holding of DNA samples of a person after their acquittal.[27] Whilst this was not an EU case it highlighted that the requirements of a breach to Article 8 ECHR are that the action must be: 'in accordance with the law', have a legitimate aim, and be 'necessary in a democratic society'[28] as a 'lawful' measure following PACE.[29] The consideration by the Justices in *Marper* demonstrates the careful attention given to establishing a balance between the rights of

[19] EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 Article 24(1).
[20] PECR Reg 6(2).
[21] Handbook on European data protection law 2018 edition, (Imprimerie Centrale 2018), p34.
[22] ibid.
[23] Information Commissioners Office, 'Halfords Fined for Sending Nearlt 500,00 Unwanted Marketing Emails'(*Information Commissioners Office*, 6th September 2022) https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/09/halfords-fined-for-sending-nearly-500-000-unwanted-marketing-emails/ accessed 20th November 2022.
[24] PECR Reg.6(1).
[25] PECR Reg.6(4)(b).
[26] Data Protection Act (n14), art 5.
[27] *S and Marper v UK* [2008] ECHR 1581, para 17.
[28] ibid, para 95-126.
[29] Police and Criminal Evidence Act 1984.

the individual (Mr Marper not having his personal data being kept by the police) and the public interest (the prevention of serious crime as mentioned earlier in relation to *Digital Rights Ireland*).

The focus of Santos' statement is technology and innovation, however, the caselaw on the area of security and government (*Marper* and *Malone*) is still pertinent.[30] *Malone* in particular centred around an unlawful bugging of a telephone communication while the PECR concerns communication networks and services, not telephone networks.[31] Nevertheless, the interpretation of the scope of Art.7 by the CJEU is relevant to the converstation and these cases demonstrate that privacy requires protection in relation to both criminal and civil law, showing that there is a balance to be struck in each area where the rights of the individual are protected but not absolute.

**Contextual Integrity**

The presumption of no unauthorised access to information found in the PECR follows Helen Nissenbaum's theory of Contextual Integrity which outlines that any information can be considered private and intimate.[32] Therefore, the question of whether the right to privacy has been violated in collecting and processing the information depends entirely on the context and the consent of the individual to whom the information belongs, instead of the type of information which is being shared. Ergo, consent can be given to share sensitive information resulting in no violation taking place, and non-sensitive information can be shared without consent leading to a violation. The presence or lack of consent of the user is the deciding point of the violation.

Paralleling this theory, the PECR prohibits the collection of any information in the 'terminal equipment of a subscriber' (commonly known as cookies), protecting the data until qualified authority to collect it is given.[33]

The PECR creating contexts for what is legally acceptable reflects Nissenbaum's idea of 'norms governing the appropriateness of information to a context.' When these norms are respected, it can be said that Contextual Integrity is maintained. The 'norms' in question are found in Reg.5: 'appropriate technical and organisational measures to safeguard…security', Reg.6: 'shall not gain access to information stored' without consent, and Reg.14 which provides restrictions on the processing of location data. These restrictions govern how and when data can be acquired and processed. When considered alongside the negative obligation presumptive approach mentioned earlier, it can be seen that the PECR applies the theory of Contextual Integrity by allowing the individual to decide when and how their data is processed and by whom. Although subject to certain qualifying criteria which allows for an appropriate balance of interests, this legislation can be understood to apply Nissenbaum's theory of Contextual Integrity to protect the privacy of the individual.

[30] Council of the EU Press Release (n 9).
[31] *Malone v United Kingdom* [1984] ECHR 10, para 7.
[32] Nissenbaum,(n 12), p56.
[33] PECR Reg 6.

**Is the Goal of Balance Appropriate?**

It must be addressed that the often-used metaphor of 'balancing' the considerations of the public interest and the preservation of innovation and business interest has been criticised by some as 'undesirable' in the legal domain as there is no 'neutrality and objectivity.'[34] This is based on the argument that legal principles and rights do not have weight but are assigned weight by 'researchers, politicians, and judges'[35] which is inherently subjective. In particular, Van der Sloot labels the concept of balancing as 'newspeak' and notes that the 'legal documents themselves do not necessitate using terms such as balancing.'[36]

This critical approach was, however, convincingly rejected by Gellert who proposed that the concept of a balancing test, whilst imperfect in name, is 'well present in human rights law and in data protection law.'[37] Gellert argues that there is 'an explicit acknowledgement of the balancing test' in the GDPR and that the format of Art.8 ECHR as Art.8(1) giving the right to privacy and Art.8(2) giving the state a legitimate claim to limit this right creates an essential demand for a balancing act to be performed by the court.[38] It is hard to disagree with this argument which, coupled with the CJEU precedent of establishing a balancing test for the legitimate interest aspect of cases allows the question to be answered in the affirmative, balance is an appropriate goal.[39]

**Balancing the Interests Benefits All in Practice**

Maple describes the purpose of this necessary balance in the Internet of Things as seeking 'optimised and personalised service with the desire for privacy.'[40] One of the key areas put forth to demonstrate this is entertainment and media. Maple cites some potential benefits of innovation through the use of data for the consumer as 'personalised adverts for families and communities', 'potential content filtering based on age', and 'ad hoc news gathering based on location data.' All of these examples would provide an optimised and personalised service for the consumer which is considered to be in their interest but would rely on personal data which would have to be collected from each individual user. This would only be acceptable under the PECR if consent were given for the data to be collected (Reg.6), linking back to the previously discussed Contextual Integrity. A more specific example given by Maple is 'Pokémon Go', an augmented reality (AR) mobile game from 2016.[41] This game is dependent on the user's terminal device live location data which is of course incredibly sensitive data which most users would be protective of. This app requests permission from the individual for this data. Through requesting consent for specific data and therefore respecting the privacy of the user, the game is able to provide an optimised and personalised experience for the individual and created innovation in the tech sphere whilst

[34] Bart van der Sloot, 'Ten Questions about Balancing' 3(2) (2017) E.D.P.L.R 187, p187.
[35] ibid.
[36] Van der Sloot (n 10) p187.
[37] Raphael Gellert, 'On Risk, Balancing, and Data Protection: A Response to van der Sloot' 3(2) (2017) E.D.P.L.R. 180, p184.
[38] Council of the EU Press Release (n 9), art 25(1).
[39] C-13/16 *Rīgas satiksme* (ECLI:EU:C:2017:336) para 16.
[40] Carston Maple, 'Security and privacy in the internet of things' 2(2) [2017] Journal of Cyber Policy 155, p174.
[41] ibid, p165.

respecting the individual's Art.7 CFR rights. This example demonstrates that the PECR has been effective in creating a good balance which follows Contextual Integrity and allows for innovation whilst also giving the individual the ability to police when and to whom their personal data is given. In this instance the balance allows both interested parties to benefit whilst also allowing incredible innovation in the mobile AR space.

Whilst the obtaining of the user's consent allows for the individual to police when and to whom their data is shared, there is a growing concern that the constant popups in digital world requesting consent allow a 'fatigue [which] is leading to people giving more personal data than they would like.'[42] This has raised questions to whether the current model of consent gathering actually provides a 'freely given, specific, [and] informed' consent which is required under the current law of the PECR.[43] In 2021 the ICO Commissioner's Office called for fellow G7 nations to use their 'convening power' to tackle the issue, noting that it is only through a collaborative effort that a solution can be found. This reflects the ICO's intentions to limit cookie fatigue but it can be seen from the developments of the G7 countries, or lack thereof, that we are a long way from reaching a successful solution to this matter and for the time being it can be said that cookie fatigue is still an unsolved issue facing the consumer/individual.

**Innovation Benefits All**

It must be said, that innovation undoubtedly benefits all, and so all sides to the balance should champion its progress. However, all sides also benefit from privacy as a general concept. Maple concludes with reference to the benefits businesses gain from general privacy, in particular privacy about their financial performance and business intelligence which could impact their ability to borrow money, their insurance premiums, or their stock prices. Tech innovation would struggle significantly if the businesses could not obtain funding because their privacy had been infringed.

Looking specifically at privacy of the individual, Deighton remarks that 'organisations can engage more meaningfully with their customers, and customers can benefit from advertising and offers that are of real relevance to them'[44] if data can be collected effectively, showing that if privacy is respected then there is no need to view the interaction between consumer and business as having opposing aims, instead, it can be seen that they form a mutually beneficial symbiotic relationship. Through maintaining a system where the user can control their own data, trust can be established. Deighton remarks that data collection, and transparency of it 'when used in the right way, can be powerful tools for organisations in building their brand.' This is corroborated by studies which show how current tech users value their privacy and take active steps to 'hide their digital footprints', demonstrating how highly valued online privacy is to consumers and how when

[42] Elizabeth Denham, (*Information Commissioner's Office*, 7th September 2021) https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2021/09/ico-to-call-on-g7-countries-to-tackle-cookie-pop-ups-challenge/ accesses 19th October 2022.
[43] J.J. Thomson (n 10).
[44] Alison Deighton, 'Pulling back the curtain on targeted social media advertising' [2016] 16(8) P. & D.P. 9, p11.

approached correctly, it can work to build trust for business whilst also preserving the customer's rights and freedom to consent.[45]

**Concerns for the Future**

As discussed, the basis of Contextual Integrity and the PECR is consent being given by the user for their data to be collected, however, it should be noted that there are concerns for technology which does not use an interface, as well as how easily consent can be attained by certain products. Maple expresses his concerns using the example of a 'smart fridge' which tracks a person's eating habits, this information could be used by a health insurance company and the ability for consent to be collected for this data is limited by a potential lack of interface, or less interactive interface on the fridge. Another example is a 'smart toy' for a child, if the child's parent gives implied consent for their child's data to be collected by purchasing the toy, what is to be said of the child's friend who visits and whose parent is not aware? The toy cannot be expected to differentiate between the two children and the parents cannot be expected to monitor every single toy. The GDPR requires consent to be easy to withdraw which these innovations may not easily allow. These examples are used to show that consent is not a perfect fix-all solution and that difficulties eliciting or managing consent could act as barriers to either innovation or privacy as technology becomes more seamlessly integrated into users' lives. In response to this, care should be taken by companies to ensure consent is obtained at every stage and that it is easy to withdraw.[46]

**Data: A New Direction**

Following the consultation titled 'Data: A new direction' led by the 2021 Conservative government, the PECR and DPA 2018 are soon to be joined by complementary legislation known as the Data Protection and Digital Information Bill (DPDI).[47] This is still in its infancy and will need to pass through both houses of parliament before it receives royal assent, a process which can take years and entail many evolutions of the Bill.

The changes to be brought in under this Bill are made with the intention of 'securing the UK's status as a global hub for the free and responsible flow of personal data' allowing for an 'ambitious agenda for new trade deals and data partnerships' in the UK.[48] In effect it lessens the requirements and 'red tape' imposed by EU legislation such as the E-Privacy Directive (PECR). This is achieved under DPDI through the brazen unbalancing of the current legal situation and significantly tipping the scales in favour of business interests, at the cost of the individual's right to privacy.

[45] Dubois et al., 'A New Privacy Paradox: Young People and Privacy on Social Network Sites', American Sociological Association Annual Meeting, San Francisco, CA [2014].
[46] Council of the EU Press Release (n 9), art 6.
[47] Department for Digital, Culture, Media & Sport, 'Data: A new direction' (*Department for Digital, Culture, Media and Sport*, 10th September 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022315/Data_Reform_Consultation_Document__Accessible_.pdf accessed 15th November 2021.
[48] ibid, 2.

The best example of this tipping of the scales can be seen with the Bill's proposal to add more 'legitimate interests' for collecting data under GDPR rules. Under current GDPR there are legitimate interests which businesses can rely on to collect an individual's data without their consent, for which they must perform purpose, necessity, and balance tests considering the rational and reasonable expectations of their customers. The current legitimate interests centre around the public interest, that of the individual, and the prevention of crime. These tests can only apply for the interests of the data controller or a third party on the condition they are not 'overridden by the interests or fundamental rights and freedoms of the data subject.'[49] The core element of the tests is the interests and rights of the individual, not the data controller.

Under the proposed Bill, the requirement for a balancing test to be performed when assessing legitimate interests appears to be diminished, removing the need for a data controller or data processor to consider if the interests of the individual outweigh their legitimate interest. This pushes the balance away from the data subject, the individual, and into the favour of the data processors and controllers. It should be noted that the legitimate interest does not stray from the aim of public interest and does not allow for commercial uses of the legitimate interests, however the balance has nonetheless been shifted. Further to this change, the Secretary of State will be given the power to introduce new additions to the list of legitimate interests with no limitation in the Bill that they favour the public interest at all.[50]

The Bill notably introduces exemptions to consent being required for cookies, one of which allows consent to bypassed where an information society service (apps and social media)[51] wishes to 'collect information for statistical purposes about how the service is used with a view to making improvements to the service.'[52] Through this, the Bill allows for the improvement of apps and programs through user data without the need for consent to be gained in order to obtain that data, a change from the PECR Reg.6 which requires cookies can only be gathered without consent where 'strictly necessary'. This is a clear example of the law favouring innovation over individual privacy as the user's right to privacy plays second fiddle to an app being able to improve its function.

In addition to this change, the definition of 'research and statistical purposes' under GDPR is expanded under the DPDI to include the previously omitted: 'privately funded…technological development.'[53] This will allow businesses an unparalleled opportunity to gather data without the need for consent from the user where it would assist with development of new technology, with no requirement that their technology be publicly owned in any form.

A rather sinister inclusion in the Bill worth magnifying in this article is that of 'Democratic Engagement'. This legitimate interest would allow for the processing of data from persons as

[49] Council of the EU Press Release (n 9) Art 6(1)(f)
[50] Data Protection and Digital Information Bill, Part 6, p106.
[51] Information Commissioners Office, 'Age appropriate design: A code for practice for online services' (2020) https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services/services-covered-by-this-code/#code2 accessed 20th October 2021.
[52] Helen Nissenbaum (n 33) Part 4 79(2A).
[53] DPDI Part 1, p2.

young as 14 as long as it is carried out by an 'elected representative', political party, or 'candidate for election' and is 'necessary for the purposes…of assisting with a candidate's campaign for election.'[54] A blunt interpretation of this inclusion in the list is that a person or organisation with political candidacy will have the ability to process the data of children as young as 14 for their electoral campaign purposes and advantages without needing to obtain the consent of the data subject. This would allow for targeted messaging and advertising to be applied to the individual whose data has been collected, all without them consenting to this data collection.

This is intended to further the Conservative campaign of Democratic Engagement which seeks to 'encourage further participation in our democracy' and in particular focused on strategies to help young people to engage with the political process of the UK.[55] However, the question must be asked, is it necessary for this aim that children's data be gathered without their consent?

With the recent attention to the involvement of Meta (formerly Facebook) and Cambridge Analytica targeting 'Leave' advertisements to people based on their data profile during the Brexit debate, a spotlight has been shone on the risk of personal data being harvested for political gain.[56] Whilst Cambridge Analytica was found to have held no involvement in the matter past initial enquiries,[57] Facebook was notably fined £500,000 for its role in the scandal.[58] This incident showed the real risk of personal data being used for political movements and although Cambridge Analytica was resolved of blame it brought the matter to the public eye, a matter which is considered by some as posing serious risk to the 'integrity of the democratic process'[59]. This serious risk would appear to be made a legitimate interest under the proposed Bill.

Further reduction in the obligations of data controllers is found in the removal of GDPR Article 30, the requirement to maintain records of processing activities. The Bill replaces it with a similar provision, Article 30A, which omits certain requirements including the recording of a description of the categories of data subjects and their personal data and the requirement to envision a time limit for erasure of the data.[60]

These reductions in obligations will allow businesses to gather more data in an easier way with less administrative burden, as well as redirect their resources to focus on other areas such as growth and innovation, all at the cost of the rights of the individual being reduced and more of their data being gathered without their consent.

[54] Data Protection and Digital Information Bill, Schedule 1, s.9-10.
[55] HM Government, 'Every Voice Matters: Building a democracy that works for everyone', p6.
[56] 'Cambridge Analytica 'not involved' in Brexit Referendum, says watch dog' (*BBC*, 7th October 2020) https://web.archive.org/web/20201009211248/https://www.bbc.com/news/uk-politics-54457407 accessed 20th October 2021.
[57] ibid.
[58] 'Facebook agrees to pay Cambridge Analytica fine to UK' (*BBC*, 30th October 2019) https://web.archive.org/web/20201016040947/https://www.bbc.com/news/technology-50234141 accessed 20th October 2021.
[59] European Data Protection Board, Statement 2/2019, 'on the use of personal data in the course of political campaigns' Adopted on 13th March 2019.
[60] Data Protection and Digital Information Bill, Article 30A.

## The Proposed Changes to the Regulator

The Information Commissioner's Office is the UK's independent authority tasked with promoting and protecting information rights in the public interest and the privacy of the individual. This is achieved by regulating businesses and organisations who process data, acting as an entirely independent body.

The DPDI proposes the removal of the office of the Information Commissioner, replacing it with the Information Commission.[61] The structural changes proposed by the Consultation were welcomed by the ICO, in particular the change to a 'Board and Chief Executive' model similar to that of communications regulator OFCOM. The ICO response did however raise concerns of independence at the notion that the Chief Executive in question would be appointed by the Secretary of State. This provision, which would have limited the independence of the ICO, was removed and replaced with an overseeing role for the Secretary of State, with the final decision resting with the Information Commission. Whilst it was removed after criticisms, this provision would have certainly reduced the rights of the individual as one's rights are only as powerful as the authority protecting them.

The duties of the Information Commissioner are changed under the Bill, introducing elements which the Commissioner must have regard to when carrying out the functions of the office. These include introducing the consideration of the desirability of promoting innovation and competition, showing a government intention that objectives are promoted when considering the balance between innovation and privacy.[62]

In sum, the DPDI challenges the current balance between the interests of innovation and business, and the right to privacy of the individual. The Bill in its current form doubtless sets this balance firmly in favour of innovation and business, however as discussed earlier, this is not necessarily to be seen as a negative. Innovation and prospering businesses have a far from negative impact on society and undoubtedly benefit the individual in an indirect way.

The issue then remains: if the sacrifices being made at the expense of the data subject are to be considered worthwhile, the DPDI must be effective in promoting innovation and business interests, allowing for data controllers to feel real benefit and pass that down to the consumers.

## Pushing the Balance in Favour of Data Controllers Benefits Business and Innovation, Right?

The European Commission requires the UK to maintain EU Adequacy, this means that the law in the UK does not need to be the same as the EU, but should reflect the same standards in order for

[61] Data Protection and Digital Information Bill, Part 5, 10.
[62] Data Protection and Digital Information Bill, Part 1, 120A.

trade to be as seamless as possible across borders.[63] EU Adequacy decisions are made by the European Commission and the revoking of the current Adequacy decision which is valid until 2025 would be costly to UK business as they would need to find 'alternative transfer mechanisms' in order to transfer data across borders.[64] This is even more relevant for international businesses who would incur costs simply by transferring data to and from offices in jurisdictions outside of the UK. The Adequacy decision can be revoked at any time by the Commission if they rule the UK is no longer within the requirements.

The impact assessment of the DPDI found that cross border data processing will receive 'an annual benefit to trade of between £80m and £160m' under the new Bill.[65] However, the impact of a revoked Adequacy decision is calculated at between '£190 and £460 million' in one-off costs and 'an annual cost of between £210 and £410 million'.[66] This cost, if incurred through the revoking of the Adequacy decision, far outweighs the benefit to trade, and coupled with the DPDI's introduction of greater fines for breaches of PECR, one could be forgiven for wondering if businesses indeed benefit from the Bill overall.

It must be noted that the Government's impact assessment 'does not attempt to assign probabilities but simply estimates the impact in the event of loss of Adequacy.'[67] It does however note that the government holds the view that this reform is 'compatible with the EU' and therefore maintains Adequacy in their eyes.

The Bill is still in its infancy and at the time of writing has only reached the second reading in the House of Commons where MPs will debate the proposals. It is almost a certainty that the Bill will be subject to amendments as it fully passes through Parliament and the key question which arises then is whether EU Adequacy is maintained in the Bill after this process.

## What Could the Future Hold?

This article has established that the PECR is integral to ensuring the protection of personal data in the Internet of Things, with the effectiveness of the legislation coming from its basis in Nissenbaum's Contextual Integrity theory, this basis being the presumption that data cannot be collected without qualifying authority from consent. The current law favours the individual as it places obligations on the data controller and protects the data of the individual (and therefore their right to privacy) without them needing to take any active steps. The current law also allows for an

[63] 'Adequacy Decisions' (*European Commission*) https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en accessed 14th November 2021.
[64] European Commission, 'Decision on the adequate protection of personal data by the United Kingdom - General Data Protection Regulation'. (*European Commission*, 28th June 2021) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3183 accessed 16th November 2021.
[65] Department for Digital, Culture, Media and Sport, 'Data Protection and Digital Information Bill: impact assessment' (*Department for Digital, Culture, Media and Sport*, 18th July 2022) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1140162/Data_Protection_and_Digital_Information_Bill_Impact_Assessment_-_June_2022.pdf para 16, accessed 16th November 2021.
[66] ibid.
[67] ibid.

adequate balance between the interests of innovation and businesses, and the interests of individuals, which I argue are not as opposing as one may imagine. In the current balance, users of technology can benefit from new tech and innovation whilst maintaining their right to privacy and without the law stifling said innovation.

The proposed Bill, if it receives Parliamentary approval and Royal Assent, would push the balance firmly in favour of business and innovation and reduce the protection of the right to privacy enjoyed by the individual.

This shift not only disadvantages the privacy of the data subject but also brings the inherent and anticipated risk that incompatibility with EU Adequacy could cost hundreds of millions of Pounds to UK trade every year thus disadvantaging innovation in the same movement.

The Bill is almost certain to evolve in its process through Parliament and the legislators will need to be careful to not stray into incompatibility with EU Adequacy where the cost would far outweigh the benefits. With this assessment and the invitation of such a great risk, one is hard pressed to see who really benefits, if anyone, by such an upsetting of the balance.

# Explainability And Transparency Within Decision-Making Systems in the Legal Domain

*Hajer Al Raisi*

## Abstract

*Increasingly powerful forms of artificial intelligence (AI) have the potential to enhance the quality and efficiency of legal services and specifically the services provided by lawyers. While the shortcomings of AI are well-documented, the research illustrates that delineating the spheres of machine-driven decision-making and design solutions may help minimise the perennial problems of explainability and transparency. The real challenge for policymakers and the legal profession is not, whether AI is better than humans but how can lawyers and legal professionals harness its potential.*

*With the UK's long-established rule of law, there needs to be careful consideration when it comes to managing the challenges posed by AI technology.[1] When it comes to decision-making in the legal domain, achieving explainable and transparent AI systems is an essential principle of justice. However, as AI systems become more advanced, we face more challenges in determining their inner workings and functioning methods. Therefore, the essay focuses on the rising challenges of explainability and transparency and highlights research that current AI systems are unable to meaningfully explain its decision-making process. Hence, although there is an expectation for AI systems to best or match human lawyers, the current progression of such technologies allows the legal domain to utilise AI as part of the decision-making process, rather than completely replacing them.*

## Introduction

The last few years have witnessed significant advancement in the capacity of AI technologies. We see increased calls from policy debates for the need for explainability (users understanding how or why a decision was reached)[2] and transparency (accessibility to the data or algorithm)[3] in applied machine learning (ML) for decision-making processes. Jacob Turner has identified 10 regulatory ethical codes dealing with AI; where the ethical issue of transparency was present in most of them.[4] Additionally, Richard Susskind outlined the importance of explainability regarding the functioning of AI-powered expert systems.[5] We also see Professor Margret Hagan's interpretation of explainability: for individuals subject to the law to feel empowered within the justice system, we must use design law in a human-centred way, to explain the process and ideas to those individuals.[6] Deriving from such outlooks on transparency and explainability, the essay will first evaluate the recent success of AI machines in the legal field. However, it will then explore the vital need for explainable and transparent algorithms within decision-making systems in the legal domain. From that, it explains that the functioning of AI

[1] Department for Digital, Culture, Media and Sport 'Establishing a pro-innovation approach to regulating AI' ( Cmnd CP 728, 2022) p26.
[2] Finale Doshi-Velez and others, 'Accountability of AI Under the Law: The Role of Explanation' [2019] Berkman Centre Research Publication 1, p2.
[3] ibid.
[4] Jacob Turner, *Robot Rules* (1st edn, Palgrave Macmillan Cham, 2019) p303.
[5] Richard E Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (2nd edn, OUP 2017) p259.
[6] Margaret Hagan, 'Law By Design' (*Law By Design,* February 2017) https://lawbydesign.co accessed 17th January 2022.

algorithms is very distinctive, and therefore it must be used to complement the work of legal professionals rather than substitute them.[7] The essay will ultimately conclude that transparency and explainability are not one-dimensional problems; they are much more sophisticated and complicated in practice.

**Capacity to best or match the human lawyer**

According to the House of Commons 'Algorithms in Decision Making' report, there is no single agreed definition of AI.[8] Though, this report still gave a parasitic human definition, which portrays the key link between AI and human intelligence: a software system that can stimulate elements of human behaviour such as learning, reasoning and classification.[9] We see this link in areas of AI such as Susskind's expert systems which sustain heuristic reasoning to create human-like representations using techniques based on logic and inference.[10] Susskind did not feel that this technical edge of expert systems had over human lawyers would completely replace humans, instead, it is to be deployed to enhance existing legal service providers.[11]

Yet, in recent times, there have been evidence of powerful AI systems that outperformed human lawyers. An example of this is the CaseCrunch AI system which have challenged lawyers to accurately predict the outcome in payment protection insurance mis-selling claims.[12] The ML AI hit an 86% accuracy rate whereas the lawyers achieved a score of just 62%. Whilst the results give a useful comparison between AI and humans, it does not necessarily mean that ML AI is better at predicting outcomes than human lawyers. Instead, it evidences that machines will be able to outperform human lawyers when it is given precise and defined questions.[13] Similarly, another point of argument cascades from the numerical value of the 86% accuracy rate. It is arguable whether such a percentage is sufficient when dealing with sentencing or determining breach. Hence, the need for safeguards ('human in the loop') or design solutions such as Hagan's design theory becomes important.

When looking at whether such systems can provide a reliable substitute for human lawyers, the AI fallacy is one of many points of resistance that some lawyers use to argue that AI machines cannot provide a reliable substitute for them. It is the assumption that if a computer (powered by advanced AI) cannot work in the exact same way as a human expert, then it will never replace a human. Yet, we are mindful that even the best AI today cannot replicate the feelings, emotions and interactions of a human lawyer. The strength of technology is that it functions

[7] Carl Benedikt Frey and Michael A. Osborne, 'The Future of Employment: How Susceptible Are Jobs to Computerisation?' (2017) 114 Technological Forecasting and Social Change 254, p 259.
[8] Science and Technology Committee, *Algorithms in Decision Making* (HC-2017-18-351) p7.
[9] ibid, p7.
[10] Richard E. Susskind, 'Expert Systems In Law: A Jurisprudential Approach To Artificial Intelligence and Legal Reasoning' (1986) 49 The Modern Law Review 168, p173.
[11] Susskind (n 5) p181.
[12] 'AI Beats Human Lawyers In CaseCrunch Prediction Showdown' (*Artificial Lawyer*, 28th October 2017) https://www.artificiallawyer.com/2017/10/28/ai-beats-human-lawyers-in-casecrunch-prediction-showdown/ accessed 17th January 2022.
[13] ibid.

differently from a human being.[14] ML algorithms use statistical techniques to identify patterns and make predictions. The complex nature of its functioning renders it difficult to understand, even for expert users and its developers. Such complexity is often expressed as the 'black box' problem. The precise criteria being used by ML AI are often impenetrable as humans cannot recognise the way it classifies data into such categories or how it identifies patterns. So, whilst ML is deemed to be of a high accuracy rate, the lack of understanding of the way it functions questions whether it can truly substitute human lawyers.

Drawing on Lisa Webley's interview with the Legal Services Board, Webley reminded us that lawyers are guardians of some key values, one of them being natural justice.[15] Natural justice conveys that if you are subject to a particular decision, you have the right to know how or why the decision-maker reached that decision. In such cases, 'explanations are not desirable, but legally operative'.[16] Explanations allow us to meet essential social values; allowing individuals to challenge a decision, but also acknowledge a sense of agency when it comes to the way they are treated.[17] Therefore, since justice is perceived as an inherently human concept, it becomes difficult when AI systems try to replicate it within their reasoning. People who have studied this issue for thousands of years have struggled to agree on a single view and so, expecting a clear answer from an AI system might be deemed difficult.

Susskind's epistemological issue draws on the same idea, that building AI systems to deal with the law is very complicated, as some areas of law are subjective and do not give you a straight answer.[18] This is further demonstrated by the lack of critical thinking in AI systems. Whilst AI systems sustain their analysis from quantifiable data, this becomes more difficult when a case becomes elusive regarding its moral or ethical stance. Therefore, since legal practice is perceived to necessitate progressive cognitive abilities by using abstract reasoning and problem-solving skills, AI systems fall short of truly replicating this high-order cognition and human intellectual abilities in environments of legal and factual uncertainty. Additionally, in a paradox of a Society of Control, humans themselves cannot truly understand the rules or patterns of conduct which develop in highly automated environments.[19] Therefore assessing whether technology could do the same becomes challenging. Subsequently, whilst we do hope for AI to potentially substitute humans, the area of law is multifaceted, which requires us to consider different factors when trying to replace or substitute it with technology.

## The vital need for explanation that AI cannot give

As humans, we need explanations from those systems that AI cannot naturally give. Understanding the precise mechanics of a particular system is necessary when trying to ascertain trust in the system, as it allows users to have confidence that the system works well

[14] Richard E. Susskind, 'Artificial Intelligence, Expert Systems and Law' [19900 Denning Law Journal 105, p 112-113.
[15] Legal Services Board Podcast, 'Ethics, Technology and Regulation' (21st May 2020) https://legalservicesboard.podbean.com/e/ethics-technology-and-regulation accessed 17th January 2022.
[16] Velez (n 2) p2.
[17] Legal Services Board Podcast (n 15).
[18] Susskind (n 5) p182.
[19] Frank Pasquale and Glyn Cashwell, 'Four Futures of Legal Automation' (2015) 63 UCLA Law Review Discourse 26, p39.

and appropriately. It also gives users the notion that such revelation might prevent or rectify errors.[20] Yet, we have seen situations where humans place too much trust in systems rendering undesirable outcomes (car accidents due to incorrect GPS directions).[21] The link between trust and explanation is complicated: if an AI system provides convincing but inaccurate explanations, users can develop a distorted sense of confidence or understanding, mistakenly believing in the system as a result.[22] From this, we turn to the idea of transparency: there has been recent criticism expressing that the revelation of codes/data of a system might not allow the user to truly understand the effectiveness of the system. Rebutting this argument; transparency is of high significance when trying to ascertain the extent of a particular input and its effect on the final output. Having the power to verify the output based on its inputs allows users to examine whether certain criteria were used appropriately (gender, sexuality, religion, etc.) or if unrelated/random features were used.[23] Thus, having access to the data allows us to assess whether the decision-making process was flawed.

In society, different groups require different forms of explanations depending on their contexts. If a process is handled by a human, we would reasonably expect them to be able to explain their decision-making process both in symbolic reasoning terms derived from the law and in a simpler way for the client to understand easily. Human judges/lawyers are cognizant that different social groups have different capacities to understand. However, an AI system would not be able to supply such understanding as easily. This is because AI systems are designed to strictly follow patterns as they lack the intuition and experience that humans use to make logical leaps. Moreover, AI systems are likely to miss fundamental policy questions such as fairness, unique fact patterns and conflicting rights.[24] With open-ended laws, clear and cooperative automation becomes difficult.[25] Therefore, there is this technical complication arising from explaining algorithmic decision-making processes.[26] Having established that context is vital when a decision has significant effects, society is more likely to demand explanations. The need for explainability here is critical, as it allows us to use and weigh our trust in the decision-making system and assign blame in case of a dispute.[27]

One of the main cases regarding this issue was the COMPAS algorithm operating within the American justice system.[28] It was developed to help judges reach decisions on matters regarding sentencing and the grant of parole. Yet, one of the significant concerns about the system was that in addition to its potential algorithmic biases, it was not explainable.[29] People subject to evaluation were unable to understand the way they were judged. Eric Loomis argued that the COMPAS algorithm was improper as it was unexplainable, leading to difficulties in

[20] Velez (n 2), p2.
[21] ibid.
[22] The Royal Society, 'Explainable AI: the basics' (*The Royal Society*, 28th November 2019) https://royalsociety.org/topics-policy/projects/explainable-ai/ accessed 15th January 2022.
[23] ibid.
[24] Pasquale and Cashwell (n 19) p45.
[25] ibid.
[26] Pasquale and Cahswell (n 19) p32.
[27] Velez (n 2) p3.
[28] Julia Angwin and others 'Machine Bias' (*ProPublica*, 23rd May 2016) https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing accessed 17th January 2022.
[29] ibid.

allowing it to be challenged in court the same way evidence from a human expert could have been challenged.[30] Therefore, whilst AI systems are continuously being used in decision-making, the nature of such systems become convoluted through downplaying or ignoring vital aspects of the language of law and this becomes a betrayal to the rule of law.[31] [32] Henceforth, since the dynamics of trust between people and machines are still left unclear,[33] this encourages creating standards built on ethical use and transparency to stimulate confidence in the application of those algorithmic systems within the legal context.[34]

There have been a few examples from academic literature on concepts of explainability. Exploring counterfactual reasoning/explanations as one example: an AI system has explainable traits if we can explain to the person what factors relevant to their case would have needed to be different in order for the algorithm to have reached a different outcome.[35] In the COMPAS case, Loomis had access to all 130 facts collected about him, yet, criticised that just knowing them was not enough to understand the way the algorithm processed him.[36] However, most algorithms are trained on proprietary grounds, where organizations creating them are unwilling to disclose such data for business and trade reasons.[37] This elucidates the conflict between the commercial objectives of the organizations producing the algorithm and the overall expectation for higher levels of transparency within the justice system. Looking at it from a different perspective, counterfactual explanations might also contribute to gaming the system. Understanding exactly how the decision was made provides an opportunity for people subject to the decision-making process to alter their behaviour to gain a more desired outcome in the future.[38] Therefore, whilst we require forms of explanations within AI systems, we need to be critical of the type of explanation we wish a system to provide.

Since algorithmic accuracy improves with large quantities of data, we need to be aware of the concerns regarding privacy when it comes to such a process. This is a common issue when AI systems use personal data.[39] It might potentially expose vulnerable groups to risk and harm when their proprietary information is at risk. Therefore, lawmakers and regulators are advised to be careful when coding legal obligations into software systems.[40] However, it should be noted that AI systems, unlike human decision-makers, can delete information to optimize their data storage which often protects privacy.[41] Though, a system designed in this format will be incapable of generating *ex-post* explanations the same way a human is capable of.[42] This problem will not be present if we were to compare it with a human lawyer's ability to provide

[30] Angwin (n 28).
[31] Frank Pasquale, 'A Rule of Persons, Not Machines: The Limits of Legal Automation' (2019) 87 George Washington Law Review 1, p54.
[32] Adrian Zuckerman, 'Artificial Intelligence - Implications for the Legal Profession, Adversarial Process and Rule of Law' (2020) 136 Law Quarterly Review 427, p429.
[33] The Law Society, *'Horizon Scanning: Artificial Intelligence and the Legal Profession'* (2018) p14.
[34] Ibid, p12.
[35] Velez (n 2) p7.
[36] Angwin (n 28).
[37] The Royal Society (n 22).
[38] ibid.
[39] The Royal Society (n 22).
[40] Pasquale (n 31) p3.
[41] Velez (n 2) p10.
[42] ibid.

legal services. Most human lawyers are trained to respect the high ethical codes, primarily respecting the client's privacy and autonomy. Moreover, a human lawyer can derive their judgement from previous experiences and use their strategic and creative thinking to generate viable explanations that are considered common and logical to society. Yet, an AI system on the other hand could lack such important skills when it comes to the law, as it falls short of the emotional intelligence and empathy used by human lawyers. Therefore, when developing AI systems, we must explicitly address those design questions.[43] Hence, with such rigid complexities regarding AI systems, we truly consider whether they can provide a reliable substitute for human lawyers.

## Conclusion

Whilst AI systems have proven to have the ability to 'best' or match human lawyers, AI systems cannot meet our high standard of expectations around 'transparency' and 'explainability' due to the complex nature of their functioning. In practice, AI systems are much more complex than the 'black-box' problem. Explainability being defined to only certain technical terms as opposed to more human terms renders it difficult to understand. Likewise, AI might not possess key values that lawyers uphold such as natural justice. As a result, this leads to exposing potentially vulnerable groups to risk and harm. Since AI systems lack key ethical codes and values, the client's privacy and autonomy can be at risk. Consequently, whilst AI systems have the power to compete with human lawyers, the lack of explainability and transparency within those systems makes it difficult to completely substitute human lawyers.

[43] Velez (n 2) p10.

# The European Super League – Football's Hero or Villain?

*Gemma Watson*

## Abstract

*Football is the world's most popular and widely distributed sport.[1] The European Super League, referred to in this paper as the ESL, was the proposal of a breakaway league described as "a spit in the face of all football lovers" by the President of UEFA Aleksander Ceferin: the new league would create both a sporting performance and commercial safe-haven for the teams involved by not allowing relegations from the league, and only including some of the richest and most well-known teams in Europe.[2] This essay will discuss the current structure of European football, what the ESL proposed and why it so catastrophically failed, the issues within football both domestically and internationally, and recommendations for future reforms that would work to secure the longevity of the sport. This includes a number of legal, regulatory and social issues. It will argue that the idea of a Super League is not something that is going to disappear just because this proposal failed, and that in order to maintain European football in its current state, i.e. controlled by UEFA and FIFA, there needs to be drastic reform to the governing bodies, not least in both culture and democracy.*

## Introduction

The European Super League was a proposal brought by 15 of the top teams within European football which planned to form a breakaway league, independent of UEFA and FIFA, where the 15 founding teams (in addition to 3 more members that were never announced) would have a guaranteed spot in the league. The league had a $4bn financial investment from JP Morgan. This assured participation is similar to North American leagues such as the NFL, NHL and NBA, where the franchise is the gatekeeper to widespread commercial success for teams, and teams that negotiate their place in the league cannot be promoted or relegated to other leagues within the sport.

## Context of European Football and the European Super League

In addition, the ESL would have introduced an overall spending cap on teams, which would have been calculated proportionate to their revenue to 55% of club revenue. The guaranteed annual participation of these big-name clubs would have provided confidence to broadcasters that each game would feature the top, most popular teams – the founding members included top teams from all over Europe. The 15 founding clubs were Manchester City, Manchester United, Chelsea, Tottenham, Liverpool, AC Milan, Inter Milan, Juventus, Atletico Madrid, Barcelona and AC Madrid.

The ESL would 'replace' the Champions League, i.e. the clubs who are part of the ESL would no longer participate – although it would continue to be held for the remaining clubs. The Champions League is run very differently to the proposed ESL: clubs are included based on

[1] Ulrik Wagner et al. 'Commercialisation, Governance Problems and the Future of European Football - Or Why the European Super League Is Not a Solution to the Challenges Facing Football' 14 [2021] 3 IJSC 321, p327.

[2] Joshua Robinson, 'Super League Moves to Head Off Bans --- The shocking announcement from 12 European clubs has left soccer's authorities scrambling' (*Wall St Journal*, 19th April 2021) https://www.wsj.com/articles/european-soccer-super-league-fifa-uefa-11618834570 accessed 23rd November 2021.

that season's performance in domestic leagues, for example in England, the top 5 performing teams in the Premier League then go on to compete in the Champions League. This means that the line-up of the league changes every year and ensures that every team earns their chance to compete – as one would expect, the top and richest teams (including those proposed to compete in the ESL) participate very frequently. Within the Champions League, there is also no spending cap on clubs, so teams are free to spend whatever budget they have on maintaining and improving their team. However, this financial inequality is particularly significant, and frustrating, to teams and supporters who do not have the financial means to invest in their teams to a level even close to that of the larger clubs, and consequently cannot achieve the same level of performance. In these ways, the Champions League is far more in line with European principles of the free-market economy than the proposed European Super League.

The Super League also violated UEFA statute, particularly Article 49(3) which states that competitions played on UEFA territory need prior approval of FIFA and/or UEFA.[3] This means that the rebel teams were required to seek permission from the governing bodies before holding competition in countries regulated by UEFA.

## Issues within European Football

*Effect of covid, FIFA and UEFA*

European football has always been fraught with economic and social issues. Recently, these have come to light due to the COVID-19 pandemic, where a KPMG report estimated that higher-tier leagues would lose $7.3bn in profits by the end of the 2020/2021 season.[4] It has been commented that the ESL provides teams an opportunity to bounce back after the pandemic, however the financial issues that plague football can be traced to significantly prior to the pandemic. European teams and leagues have struggled with financial sustainability, which has been heightened through increasing players' salaries. Teams are forced to prioritise self-centred financing (as seen through the JP Morgan investment within the ESL) over the long-term sustainability of the sport.[5] This means that the smaller teams are consistently dominated by the larger teams with the deeper financial pockets. The ESL seemed to attempt to solve this issue through implementing salary caps, however the specific way in which this was proposed did not solve the issue. This is because the salary cap was proportionate to the revenue of the team, which was set to 55% of club revenue. This approach would not solve the fundamental financial issue within the sport since the larger teams would continue to be left with a disproportionate amount of funding to pay their players, which would continue to encourage the top players to go to the richest clubs, which will likely only increase the dominance of the richer clubs further. A more effective solution to this would be to introduce a league-wide cap for wages, or even UEFA/FIFA wide caps. This is similar to leagues in North America, such as the NHL, which implements a team maximum salary cap of $81.5m

[3] CMS, 'The European Super League: An overview of legal challenges' (*CMS Law-Now*, 29th April 2021) https://www.cms-lawnow.com/ealerts/2021/04/the-european-super-league-an-overview-of-legal-challenges accessed 20th November 2021.
[4] Michael Taube, 'Lament for the European Super League' (*Wall Street Journal*, 28th April 2021) https://www.wsj.com/articles/lament-for-the-european-super-league-11619561792 accessed 22nd November 2021.
[5] Wagner (n 1) p323.

(in addition to a minimum cap of $60.2 for the 2021-22 season).[6] However, this would be particularly difficult given the different currencies and countries that teams are based in, especially with leagues such as the Champions League, which involves teams from all over Europe. In addition, it is contrary to the free market economic principles that are so entrenched in British and European society.

UEFA have attempted to curb the financial issues within football by enacting the Financial Fair Play (FFP) Regulations. Football clubs tended to spend in excess of their revenues, and the FFP regulations prohibit clubs from doing this.[7] The stated basis for the regulation was "based on the principle that clubs should compete on the basis of their own financial resources," i.e. not on the basis on credit that they receive from big banks.[8] In practice, this means that there are break-even requirements in place stating that a club needs to have balanced books for any given assessment period.[9] Most significantly, revenue for the purpose of this calculation does not include equity investments from benefactors; this means that billionaire club owners cannot spend their own personal wealth to better their club.[10] In theory, the ramifications of not following these regulations can lead to UEFA banning teams from entering competitions on financial grounds, and control how owners use their wealth.[11] In reality, the extent to which this has been used is very limited. There have been sanctions handed out to rule-breakers: Manchester City and Paris Saint-Germain were fined for overspending, and Galatasaray S.K. were banned from the Champions League.[12] Predictably, there have been a number of cases that have fought the FFP regulations. It has been argued that it is incompatible with EU competition law, and there has been insufficient rulings on the issue to determine its legitimacy.[13]

The European Super League's distinct separation from FIFA and UEFA is not coincidental or without reason. Both governing bodies have been accused of wrongdoing including corruption, nepotism, a lack of democratic transparency, and a lack of support for anti-racist campaigns, gender equality and human rights. This has not least been seen in the selection and preparation for the Qatar World Cup. Qatar is a very conservative nation, with their constitution based on Muslim sharia law practices.[14] For example, homosexuality is outlawed, with the penalty for same-sex intercourse being the death penalty. Since the granting of the World Cup to Qatar, over 6500 immigrant workers have died, largely in the construction for the World Cup.[15] Despite FIFA investigating this, they took no action to force Qatar to improve working

[6] Bryan Murphy, 'NHL Salary Caps Explained: Everything you need to know ahead of the 2023 trade deadline' (*The Sporting News*, 2nd February 2023) https://www.sportingnews.com/ca/nhl/news/nhl-salary-cap-rules-explained/x1wwiew656afzelhsx4tneczaccessed 13th February 2023.
[7] Jesse Kalashyan, 'The game behind the game: UEFA's Financial Fair Play Regulations and the need to field a substitute' [2022] 18 ECompJ 21, p44.
[8] Wagner (n 1) p330.
[9] ibid.
[10] Wagner (n 1) p325.
[11] ibid.
[12] Wagner (n 1) p332.
[13] ibid.
[14] *Constitution* [Qatar] 2004 https://www.refworld.org/docid/542973e30.html accessed 20th December 2022.
[15] Pete Pattisson, 'Revealed: 6,500 migrant workers have died in Qatar since World Cup awarded' (*The Guardian*, 23rd February 2021) https://www.theguardian.com/global-development/2021/feb/23/revealed-migrant-worker-deaths-qatar-fifa-world-cup-2022 accessed 20th November 2021.

conditions. Given that the sport overall is working to become more inclusive and diverse, these human rights controversies that FIFA is seeming to ignore, or at least brush under the carpet, gives good reason and incentive for clubs to distance themselves from the organisation. The uproar from the World Cup in Qatar in 2022 has suggested the ethics of the sport is becoming increasingly important to fans, and therefore by association will likely increase in importance to clubs. Whether this uproar will prompt real change is yet to be seen. The ESL would mean that clubs would reduce their association with any of the scandals that so often frequent the front pages of the media, especially given UEFA's reaction of banning players from competing in any FIFA league (which would include domestic leagues such as those run by the FA, which is a subsidiary of FIFA). The economic value of this is unascertainable, however it is reasonable to suggest that with the rise of popularity of ethical business practices, investors could be more likely to invest in teams and players within a league that is not associated with the non-ethical business practices of FIFA. This however may not surpass the economic drive of investors from the lucrative nature of the potential commercial revenue and advertising, which present high potential profits.

## The Strengths of the ESL Proposal

*Incentives, salary caps*

The ESL looked like it was attempting to solve the financial issues by issuing a spending cap. These kinds of caps are very common in other sports – in cricket, the Indian Premier League has a salary cap of C$15.5 million,[16] the NBA has a soft salary cap of C$143m,[17] and the NHL's salary cap sitting at $81.5m.[18] Salary caps can be beneficial because they prevent the richest clubs from hoarding top talent, can make leagues less predictable and more competitive, and can place sports on a stronger long term financial footing.[19] In the sport of Rugby Union, Premiership Rugby has a 2022 salary cap of £5m, which was reformed after a review from Paul Myners, a government minister, who proposed that the salary cap be overhauled.[20] This kind of comprehensive review would be beneficial for football since it took consideration from both the public and professionals within the sport, and even goes as far as to allow Premiership Rugby to access communication and bank statements of players and club officials to ensure that the integrity of the system is maintained.[21] A comprehensive fan-led review has been completed within English football, but the sport would benefit from a wider assessment.[22] These caps show that they can be effective, and a salary cap within European football may

[16] Ujjwal Samrat, 'IPL 2022: BCCI Increases Purse Salary For Teams To Rs 90 Crore' (*Republic World*, 30th October 2021) https://www.republicworld.com/sports-news/cricket-news/ipl-2022-bcci-increases-purse-salary-for-teams-to-rs-90-crore-details-inside.html accessed 20th November 2021.
[17] Reem Abdalazem, 'Which NBA teams have the highest salary cap in the 21-22 season?' (*AS*, 15th October 2021) https://en.as.com/en/2021/10/15/nba/1634297919_586941.html accessed 20th November 2021.
[18] Chris Johnston, 'NHL is back in business with ratification of CBA, return-to-play plan' (*Sports Net*, 10th July 2020) https://www.sportsnet.ca/hockey/nhl/nhl-nhlpa-vote-accept-cba-return-play-plan-protocols/ accessed 21st November 2021.
[19] Bloomberg Opinion Editorial Board, 'Europe's Failed Super League Got One Thing Right' (*Bloomberg*, 7th May 2021) https://www.bloomberg.com/opinion/articles/2021-05-05/europe-s-failed-super-league-got-one-thing-right?leadSource=uverify%20wall accessed 23rd November 2021.
[20] Reuters Staff, 'English Premiership clubs agree to lower salary cap for 2020-21 season' (*Reuters*, 20th November 2020) https://www.reuters.com/article/uk-rugby-union-england-idUKKBN2801TC accessed 20th November 2021.
[21] ibid.
[22] Tracey Crouch MP, 'Fan Led Review of Football' (*Department for Culture, Media and Sport*, 24th November 2021) https://www.gov.uk/government/publications/fan-led-review-of-football-governance-securing-the-games-future/fan-led-review-of-football-governance-securing-the-games-future accessed 20th December 2022.

work and be beneficial for the long-term financial stability of the sport. There has never been a serious attempt by UEFA to implement such a cap, but the chaos of Covid and the ESL proposal may give them the impetus they need to implement one.[23]

An increased level of club autonomy would be a great incentive for teams to form a breakaway league. With the ESL, the club owners would have significantly more power over how the league is run, including the income from media deals which is currently controlled in the Champions League via UEFA. In order to prevent another breakaway league, it would be in UEFA's interest to allow the clubs to have an increased autonomy over certain things or increase the transparency over how internal decisions are made. However, this solution doesn't cut to the core of the issue: the increased power of the clubs was not enough for the players, fans and staff to support the ESL, and therefore increased club autonomy in UEFA-run leagues would not likely make such stakeholders more in favour of UEFA and football remaining in its current form.

## Why the ESL proposal failed

*The principles of European football*

The ESL failed because on a fundamental level, it contradicts the soul of European football. Pep Guardiola, manager of ESL-founding club Manchester City, very publicly denounced the plans, stating that "it [football] is not a sport where it doesn't matter if you lose."[24] The outroar seen among English teams, fans and *celebrities* is hardly *unpredictable*. Described by Jonathan Liew as "fierce and innate tribalism," English clubs both within and outside of the founding teams were practically unanimous in their contempt of the new plans, even going so far as for Prince William and PM Boris Johnson both making statements against the league.[25] For the last century and a half, football has been built on the idea that David can always beat Goliath, and smaller teams can still win over larger teams so long as they have the talent and intellect. Although football is dominated by certain teams, smaller teams frequently cause upsets when competing against these giants, and this essence of possibility is what keeps the passion ignited in both fans and players, regardless of their budget. This was demonstrated in the 2015/16 season of the Premier League, where Leicester City overcame all the odds and won the league, and in 2004 when FC Porto won the Champions League. The Americanisation of the sport in the ESL plans by creating a system where inclusion is not based upon merit creates an elitist league and destroys the "hope… myth and possibility"[26] that is created by leagues where the underdogs can finish on top.

The idea of mandatory competitiveness within sport has also been reflected in EU law. Article 165 TFEU states that EU action aims at "developing the European dimension in sport, by promoting fairness and openness in sporting competitions."[27] This is further reinforced in the

[23] Samrat (n 16).
[24] Jonathan Liew, 'The furore over the proposed ESL was about one question: who runs our lives?' (*The New Statesman*, 20th April 2021) https://www.newstatesman.com/culture/sport/2021/04/furore-over-proposed-european-super-league-about-one-question-who-runs-our accessed 25th November 2021.
[25] ibid.
[26] Wagner (n 1) p331.
[27] Treaty on the Functioning of the European Union [2016] OJ C202/1, art 165.

European Commission White Paper on Sports, which states that there is a requirement to "preserve a competitive balance between clubs taking part in the same competition" whilst maintaining "a pyramid structure of competitions from grassroots to elite level."[28] Having a closed league, and the overall exclusionary nature of the ESL seem in direct contradiction of these 'European values.'

There are also some employment law considerations for the ESL, or more so the reaction that UEFA had in proposing that ESL players would be banned from competing in UEFA competitions. There have been arguments made that these bans would amount to a restriction on trade, which mean that individuals should be free to follow their trade without being unduly restricted.[29] In addition to this, there have been suggestions that the creation of the ESL could be a serious enough breach of contract between clubs and their players that it could be reason enough to give players a cause to terminate their contracts if they so wish.[30] This assertion is also supported by the Premier League Handbook, which includes an obligation for clubs to follow and abide by the rules set out by the FA, UEFA and FIFA.[31] In practice, it cannot be said whether players would have taken this opportunity, however many came out and publicly denounced the Super League, so if not for the collapse at least some would likely have pursued it.

**Why does a closed structure work in North America?**

This same competitive soul isn't present in North American major sports leagues, which are all closed. In fact, even the American Soccer League, which is under the governance of FIFA, is a closed league. The fact that FIFA have allowed the American Soccer League to maintain a closed league is interesting, since it is so much in contrast to the principles that are seen in FIFA competitions across the world. The closed structure in North America seems to be successful because this model has been entrenched in most major sports, such as baseball, basketball and ice hockey. This is in complete contrast to European sports, where most major sports have an open league structure, and the hope of club's movement is valued and perhaps its most treasured characteristic.

**Failure of messaging rather than failure of concept**

Despite the backlash and collapse of the ESL, some managers have continued to support the idea, stating that the collapse was due to a failure of communication rather than a failure of idea. Real Madrid's Florentino Peres and Juventus' Andrea Agnelli have continued in their support for the league and argue that the concept was strong however the messaging was flawed, and that the financing emergency that surrounds the sport will not disappear without severe action.[32] This is to an extent true – the communication that was used to present this idea

[28] European Commission 'White Paper on Sport' COM (2007) 391 final, p13.
[29] Robinson (n 2).
[30] ibid.
[31] Football Association 'Premier League Handbook' (*Football Association*, 2020) https://resources.premierleague.com/premierleague/document/2020/09/11/dc7e76c1-f78d-45a2-be4a-4c6bc33368fa/2020-21-PL-Handbook-110920.pdf accessed 27th November 2021.
[32] Joshua Robinson, 'UEFA Survived the Survived the Super League. But Soccer's Storm Isn't Over (*Wall Street Journal*, 26th April 2021) https://www.wsj.com/articles/uefa-super-league-champions-league-ceferin-11619307977 accessed 24th November 2021.

to the public was viewed by commentators as "cold."[33] The idea was presented through statements on the founding 15 clubs' websites, which provided very limited details on the plans, no public relations, and no opportunity for further correspondence.[34] This gave the impression that the plans were created in secret by the unelected billionaire owners of clubs, who plotted to destroy classical European football and expected no one to have any issue with it, and if they did, it was not their problem. This emulated the disconnection between those in the boardrooms of clubs and the other stakeholders, i.e. the players, managers, playing staff, commentators and, above all, fans. This discrepancy has been so obvious that it has caused Chelsea to allow fans to be present at board meetings, which was introduced as a response to the board's misjudgement of fans' reactions.[35]

**Reactions in favour of the league**

Some commentators have come out to support the ESL, and don't understand why clubs wouldn't consider the opportunity. Columnist Michael Taube, who identifies as a Liverpool supporter, argues that the financial reasons should be enough to at least consider it.[36] He argues that with JP Morgan's multibillion-dollar investment, the ESL provided teams with an opportunity to bounce back from the financial difficulties presented by the pandemic and would have given the other teams the chance to benefit if they got the chance to play as one of the 5 selected based upon performance merit.

**Reaction from UEFA/FIFA and issues with EU competition law**

The reaction from UEFA was to threaten to ban players from all UEFA or FIFA run competitions at any level, which could have included domestic competitions such as the Premier League, European leagues such as the Champions League and international competitions such as the World Cup.[37] The European Court of Justice clarified in 2006 that EU law can apply to sports-related economic activities,[38] and since this is related to economic activity due to the effect that these bans would have on players' and clubs' incomes, EU law still applies. There are no exceptions, unlike those found in US law with Major League Baseball. It could be found by courts that UEFA's threats are not compatible with Article 101 of the Treaty on the Functioning of the European Union, which lays out in section 1 that agreements and decisions made that affect trade between Member States with the object to prevent, restrict or distort competition within the internal market is prohibited.[39] It is likely that the court would rule against UEFA since the proposed ban would mean that the internal market of the EU free movement of both trade and people would be limited – this issue is currently before the European Court of Justice. To note, it is somewhat irrelevant that some of the teams are from the UK, which is no longer part of the European Union and therefore not bound under

[33] Reuters (n 20).
[34] ibid.
[35] Wagner (n 1) p331.
[36] Michael Taube, 'Lament for the European Super League' (*Wall Street Journal*, 27th April 2021) https://www.wsj.com/articles/lament-for-the-european-super-league-11619561792 accessed 21st November 2021.
[37] Dwayne Bach, 'The Super League and its related issues under EU Competition Law' (*Kluwer Competition Law Blog*, 22nd April 2021) http://competitionlawblog.kluwercompetitionlaw.com/2021/04/22/the-super-league-and-its-related-issues-under-eu-competition-law/ accessed 21st November 2021.
[38] C-519/04 *Meca-Medina and Majen v Commission* [2006] ECR 1-7006, para 22.
[39] Samrat (n 16).

European Law, and that UEFA is based in Switzerland. This is because the ban affects the single market, and all the other teams are based within the EU. For example, in 2017 European Commission regulators ruled in favour of a duo of Dutch speedskaters when they wanted to compete in lucrative events that were not sanctioned by the International Skating Union, the sport's governing body. This decision was then upheld by the EU General Court which considered the rules contrary to EU competition law.[40] They stated that the governing body was "required to ensure… that third-party organisers of speed skating competitions are not unduly deprived of access to the relevant market."[41] If this was applied to UEFA, it is likely that the EU courts would find in favour of the team/s that were disputing the threatened ban by UEFA of players and clubs taking part in the ESL from competing in FIFA and UEFA competitions such as the FIFA World Cup. However, this view is not held by some – UEFA President Aleksander Ceferin stated that the ESL itself was likely contradictory to "all the competition laws in the world".[42] But on balance of probability, it is unlikely that the court will agree.

This opinion has been reinforced by the fact that the Madrid Commercial Court blocked UEFA from acting on any threats based on an incompatibility with EU competition law, although one could argue that this action was taken in order to refer the decision to a higher court.[43] This ruling is now before the European Court of Justice, which will have the ultimate final say on its legitimacy, however this judgement is not expected until at least early 2023.[44] Some commentators have seen the Super League as an attempt to break the monopoly that UEFA holds over European football, with those favouring the ESL arguing that UEFA's position is contrary to EU competition law.[45] When this goes to the European Court of Justice, and if the courts side with the clubs (i.e. in favour of A22, the group bringing the case on behalf of the three rebel teams), it could be a landmark decision: the implications that this would have on the structure of European football would be widespread and give legal rise to the potential of the establishment of others to found their own competitions and tournaments independently of UEFA and FIFA.[46]

The Nuremberg Regional Court had a question posed to it that was relevant to this case – Can a sports federation ban athletes from its events because of their participation in a rival federation's competition? The court found that governing bodies excluding athletes from taking part in competition based on the fact that they competed in a rival's competition can be

[40] Joshua Robinson, 'Super League Moves to Head Off Bans - The shocking announcement from 12 European clubs has left soccer's authorities scrambling' (*Wall Street Journal*, 20th April 2021) https://www.wsj.com/articles/european-soccer-super-league-fifa-uefa-11618834570 accessed 23rd November 2021.
[41] ibid.
[42] Robinson (n 40).
[43] PA Media, 'UEFA calls for removal of European Super League court case judge' (*The Guardian*, 28th September 2021) https://www.theguardian.com/football/2021/sep/28/uefa-calls-for-removal-of-european-super-league-court-case-judge accessed 22nd November 2021.
[44] Ali Walker, 'UEFA battles Super League at EU's top court' (*Politico*, 11th July 2022) https://www.politico.eu/article/super-league-uefa-begin-battle-at-eus-top-court/ accessed 3rd August 2022.
[45] Arthur Sullivan, 'Super League clubs tackle 'monopolistic' UEFA on EU law' (*DW*, 29th October 2021) https://www.dw.com/en/super-league-clubs-tackle-monopolistic-uefa-on-eu-law/a-59645489 accessed 15th November 2021.
[46] Robinson (n 40).

found to be contrary to EU (and therefore German) competition law.[47] Despite this, sporting federations are not wholly banned from protecting their economic interests against their rivals: they just cannot use "unfair" measures to do so.[48] This sentiment is also reflected in the International Skating Union decision in 2020 as discussed previously. The question was analysed via a three-step test: (i) was a legitimate objective pursued, (ii) were the steps taken necessary to achieve the objective, and (iii) were they proportionate?[49] It is not clear from the Wrestling Federation case whether UEFA's proposed bans would be seen as legitimate. In the Wrestling case, it was found that the actions were not necessary to ensure the following of anti-doping policies. The emphasis is on the fairness of the actions taken. This case does demonstrate the growing importance of competition law in sports, and demonstrates that it is not good enough for governing bodies to simply have legitimate goals – it is essential that the actions that are chosen are necessary and proportionate to achieve those goals.[50]

It should also be noted that a number of the executives taking the lead in the ESL were also intrinsic within UEFA and were therefore privy to confidential and sensitive information that could have led the ESL project to get an unfair advantage. For example, Andrea Agnelli, the chairman of Juventus, resigned from his position as the chairman of the European Club Association, which is a representative of the club interests in UEFA, the day that the ESL proposal was announced.[51] This means that UEFA could use this as a cause of action in EU law for breach of confidentiality which led to the leading executives of the ESL had an unfair advantage when considering their plans.[52]

It could also be argued that Article 102 of the TFEU could be used in this scenario to suggest an abuse of a dominant position.[53] UEFA currently has somewhat of a monopoly of European football and the ESL would have been a new entrant into the market, by organising the two only Europe-wide football competitions: the Champions League and the Europa League. By using this position to attempt to ban players and prevent this new entrant from entering the market, it would suggest that EU law was contravened.

There is a potential counterargument in that the ESL would have restricted or distorted the freedom of competition that European football currently enjoys, given that it currently operates as an open competition where sporting success leads to financial success, because it would limit sporting success (and therefore financial success) to only a very select few.[54]

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[47] Tobias Rump, 'Dominance in Wrestling: Court ends the (antitrust) right between Sports Federations' (*Linklaters*) https://www.linklaters.com/en/insights/blogs/sportinglinks/2021/march/dominance-in-wrestling-court-ends-the-fight-between-sports-federations accessed 16th November 2021.
[48] ibid.
[49] Sullivan (n 45).
[50] Rump (n 47).
[51] Robinson (n 2).
[52] Robinson (n 2).
[53] Liew (n 24).
[54] Noel Beale, 'Cancelled or delayed? European Super League competition law case study' (*Burges Salmon*, 14th May 2021) https://www.burges-salmon.com/news-and-insight/legal-updates/competition/cancelled-or-delayed-european-super-league-competition-law-case-study accessed 16th November 2021.

The Super League format could have been developed further using the assumption that there would be a trickle-down effect upon national leagues – the Super League format would make it significantly more difficult for teams to enter into the higher league (i.e. the Super League) because there were only 5 potential spots open to teams outside of the founding 15.[55] The Super League teams would also have an advantage in national leagues due to the increased revenue from the guaranteed spot in the league, which among other effects, would further exacerbate the financial inequality issues that already cause frustration.[56]

## Suggestions for the future and Reforms for The Sport

*Reforming democracy in the sport*

Despite the swift collapse of the ESL, it is unlikely that this will be the last that football followers hear about a breakaway league. The Champion's League is undergoing several reforms for the future season – these include increasing the number of games being played in a season by expanding the number of competing teams by 4 from 32 to 36.[57] This is not necessarily going to solve any of the issues that plague the sport – for example, players and managers have complained of being burned out due to too many games being played in a season. This indicates that UEFA are financially motivated from the perspective of selling increased TV coverage, rather than motivated by improving the league itself or the welfare of the players competing within it. By increasing the competing teams, potential burnout will only be further augmented, and lead to less contentment within teams – instead of the group stages comprising of 96 games to knock out 16 teams, it will now take 180 games to knock out 12.[58] This could cause players and playing staff to look outside of the traditional leagues to find a solution to this. For example, in the 2019/20 season, Liverpool had no choice but to play their youth team in a League Cup tie since it was competing in the FIFA Club World Cup the next day.[59] In fact, these changes could inspire a different iteration of the Super League to be proposed: a league with a fewer number of games, which would appeal to players, that would be more cohesive with the other leagues so that certain periods weren't so busy and hard on the whole team, such as around the Christmas period. The number of games is not just a simple issue of tired players – with more games comes more injuries, especially soft-tissue injuries which are the result of fatigue.[60] This Swiss model has been cited by commentators as "a terrible idea" – it is simply an overly long slew of games, few of which have any meaning since it is merely a bulking of the group stage, between relatively large teams.[61] This seems to be a separation from traditional footballing values: it has been argued that these reforms make the Champions League "a Super League by stealth."[62]

[55] ibid.
[56] Beale (n 54).
[57] Commission White Paper (n 28), p13.
[58] Jonathan Wilson, 'Everything That's Wrong About the Future of the UEFA Champions League' (*SA*, 31st March 2021) https://www.si.com/soccer/2021/03/31/champions-league-future-format-expansion-swiss-system-criticism accessed 16th November 2021.
[59] ibid.
[60] Wilson (n 58).
[61] ibid.
[62] Wilson (n 58).

In addition, the financial discrepancies between teams requires change in order to prevent more breakaway leagues from being proposed. For example, when Ajax reached the semi-finals of the Champions League, they received half as much prize money as Barcelona, who reached the same position, simply because Spain has a larger TV market than the Netherlands.[63] This has led to effective monopolies within the game, and means that some countries are significantly disadvantaged in producing teams of the highest calibre, such as Dutch teams like Ajax, who despite being 4-time European champions, are still seen as the underdogs.[64] A way in which this should be rewarded is through a more equal splitting of media revenue between teams (via prize money) so that certain countries are not disadvantaged. This is in the interests of everyone – with a larger budget, these clubs can build a better roster of players, and therefore are likely to perform better in both domestic and European leagues. This in turn would prompt a positive cycle – it would likely increase the viewership of the sport in that nation, and through this, budgets in other domestic teams may increase. Fairer distribution of profit can only result in positive effects on the sport overall.

**Reforming the governing bodies (FIFA and UEFA)**

The first place to start to protect from future breakaway leagues is by reforming UEFA. UEFA needs to be more transparent with increased legitimate oversight procedures to ensure that club owners are not incentivised to distance themselves from the leagues. UEFA should not only have democratic reform but also a reformation of culture – this is to put greater emphasis upon supporting women's football, football for the disabled and football for older people. This should not only generate increased passion for the sport at a grassroots level, but also work to right the wrongs of the past when these were not supported and instead seen as a financial burden. In addition to this, more work needs to be done by UEFA in supporting social campaigns such as fighting racism in football – although these might not be the priority of club owners, it should ensure that fans will continue to support the leagues run by these bodies, or at least not give them a reason to protest about being part of a league run by UEFA. The need for reform has recently become even more prominent - in October 2021, FIFPRO and European Leagues both "broke ranks" with UEFA.[65] FIFPRO, the international players' union, and European Leagues, which represent domestic competitions throughout Europe, have made this separation in hopes of gaining more representation for players, fans and leagues at the highest level, i.e. within the governance of European football.[66] This has been viewed in the media as a "direct challenge" to UEFA's governance system, and seems to be attempting to take advantage of the chaos within the sport in the wake of the ESL proposal and collapse.[67]

**Non-proportionate salary caps for teams**

It would also likely be beneficial to introduce a spending cap on teams within European leagues such as the Champions League. In practice, this could be implemented in the Champions

[63] ibid.
[64] Wilson (n 58).
[65] Paul MacInnes, 'UEFA faces call for governance reform to stem Super League threat' (*The Guardian*, 26th October 2021) https://www.theguardian.com/football/2021/oct/26/leading-european-football-bodies-break-ranks-uefa-reform-european-super-league accessed 22nd November 2021.
[66] ibid.
[67] MacInnes (n 65).

League with some difficulty, since teams move in and out of the league every season, and all the teams also compete in different cups and leagues throughout the season, however it would work to solve the issue of dominancy for certain teams, so long as the cap was placed at a level that would be meaningful to all teams, i.e. not be so high that it was still unreachable for the medium-sized and smaller teams. It would be useful for a review to be conducted similarly to that undertaken in Premiership Rugby to set this, with consultation from a variety of European teams at all levels of revenue. This should particularly review UEFA's Financial Fair Play regulation, which has been largely ineffective in curbing the spending of the largest clubs.[68]

**Diversification of football**

It has been argued by Wagner, Storm and Cortsen that there are issues at the bottom of the sport, one of which being that children may not choose football anymore, instead opting for either no sport, or online gaming such as FIFA.[69] Although the rise in popularity of online gaming and e-sports is unmistakable, the authors takes an elitist view by suggesting that football is directly replaceable in the 'free-time' market by online gaming.[70] This view is unrealistic and disregards large European (and global) population demographics: many children cannot afford a games console whereas a physical sport such as football is incredibly accessible, with any number of ordinary items being able to take the place of an actual football. This is not to say however that the sport could not be overtaken by others that are similarly accessible such as cricket, which requires very little equipment and is very popular in less economically developed nations, but the idea that physical (and therefore accessible) sports will ever globally, or even just in Europe, surpass football is unrealistic.

**The culture of football**

The sport has an undesirable reputation for its historical and ingrained culture of racism, hooliganism and violence which makes a cultural reform both more difficult but also more necessary for the future of the sport. This reputation is particularly significant in the United Kingdom, with football hooliganism reportedly dating back to the Middle Ages when King Edward II banned football in 1314 due to violence.[71] More recently, there was rioting and violence in the wake of England's loss to Italy in the Euro 2020 Final in July 2021. This hooliganism is not just an issue in the UK but is becoming an increasing issue across Europe. For example, there has been reports of "shocking" fan disorder in Ligue 1 in France, which has led to the President of the Ligue de Football Professionnel (LFP) to call the violence "a gangrene that could kill us."[72] It has led to matches being called off after incidents such as bottles being thrown by fans which have hit players, including Marseille midfielder Dimitri

[68] Sergei Klebnikov, 'Fiorentina's Billionaire Owner: Why I'm Glad the Super League Failed' (*Forbes*, 23rd April 2021) https://www.forbes.com/sites/sergeiklebnikov/2021/04/23/fiorentinas-billionaire-owner-why-im-glad-the-european-super-league-failed/?sh=245f91e6483d accessed 22nd November 2021.
[69] Wagner (n 1), p334.
[70] ibid.
[71] Giovanni Carnibella et al, *'Football Violence in Europe: A Report to the Amsterdam Group'* (Social Issues Research Centre, 1996) p 27.
[72] Paul Doyle, 'Shocking rise of fan disorder leaves Ligue 1 facing an existential crisis' (*The Guardian*, 27th November 2021) https://www.theguardian.com/football/2021/nov/27/ligue-1-supporters-disorder-violence accessed 28th November 2021.

Payet, on the head.[73] This has resulted in security staff holding riot shields around the pitch to ensure the safety of those playing.[74] There has been very little response from clubs within Ligue 1, reportedly for fear of alienating fans, which suggests that more needs to be done from the top from bodies such as FIFA and UEFA.[75] This kind of violence, and the lack of accountability and overall response from FIFA and UEFA, was brought clearly into the British consciousness during and after the 2022 Champions League Final in Paris, where Parisian local authorities acted in such a way that put the fans attending the match at risk. This demonstrated that there needs to be reform not only by the fans, but also the mechanisms and authorities used to control them before, during and after large events. The lack of proper response from these bodies further emulates the idea that hooliganism and violence is accepted within the sport, which is not good for the future of football since it is alienating people from becoming fans or even players of the sport, and could have serious economic consequences by alienating potential investors. A way in which the sport could be reformed to shake this image is through more decisive action from FIFA and UEFA – there is too much fear from individual clubs that potential individual action could be detrimental to the support of their fan-base, which is not an unreasonable fear given many clubs' precarious financial positions after the pandemic. Action that UEFA and FIFA could take is by threatening sanctions upon clubs if their fan-base behaves poorly, or begin more stringent with banning individual fans from stadiums and other sporting events. UEFA could also create stronger regulations of how crowd-control is managed within and around stadiums, and greater security measures at stadiums. Overall, FIFA and UEFA need to do more to emphasise that this hooliganism is a high priority to solve in the sport and will not be tolerated.

This change in culture is not unrealistic – it has been seen in the recent 2022 Women's Euros (hosted and won by England) that children and women have been in greater attendance than the male championship counterpart, and there have been no reported issues with crowd control, despite the final being attended by the greatest volume of fans at any European final irrespective of the gender of the players. This shows that this behavioural issue is not simply an issue inherent with football as a sport, but instead men's football as a culture, and can be improved as the behavioural expectations of fans change as the demographics of those both competing and attending football games changes.

To conclude, the European Super League would not have solved as many issues at it would likely have created within football, and its quick collapse demonstrates its incompatibility with European football culture. The proposal was interpreted as the wealthy club owners trying to simply grab more money, with no consideration for the fans or for the teams that would not be able to compete. A closed league is contrary to the essential soul of European football, where inclusion is based on merit rather than pure economics, and the fact that the owners did not recognise this demonstrates how separated they are from their own community of players, fans and staff.

[73] ibid.
[74] Doyle (n 72).
[75] ibid.

The ESL has highlighted the issues that are embedded within European football. There needs to be a serious reform starting from the very top, otherwise it will not be long until another similar (but perhaps better thought-out) version of the Super League is proposed. This reform should not begin with the proposed reformation of the structure of the Champions League to the Swiss model: this reform is unnecessary and exacerbates the issues that the clubs experience. Based on the players' and managers' reactions to the Super League, especially in the UK, it seems that they are strongly in favour of continuing in the Champions League. However, this could soon change, with the reforms making the player burnout worse by including a significant amount of new games in the group stage, which mean that they are relatively meaningless but have a high cost to players. These reforms might push some of those who opposed a Super League to change their minds.

Instead of putting so much pressure upon men's football, it could be economically strategic to focus investments instead on women's football. Women's football does not have a reputation for violence or racism, and seen as more family-friendly than its male counterparts. The growth of the popularity of women's football, as seen by the viewership of the Women's World Cup and the record viewership and attendance at the finals of the Women's Euros, mean that it is a strong investment for FIFA and UEFA to put significant resources into. These efforts would have a very positive effect upon the public opinion of the bodies – their reputation for shady dealings, racism and misogyny needs to be put clearly in the past, and what better way to begin this than championing a blossoming and inclusive sport?

**Conclusion**

It will only be a matter of time before more rebels come forward, and next time it is likely that they will be successful: if the 2021 Super League proposal is learned from, and *all* the stakeholders, including the fans, are consulted on the creation of a new league, there is no tangible reason why it would fail. UEFA and FIFA are hardly the gold-standard of governing bodies, as discussed above, and it would not take much to convince fans of this given their clouded history. Fans are not attached to FIFA and UEFA; they are simply the enablers of the teams that they love. In the next battle, FIFA and UEFA will almost certainly not come out on top.

# The Transformation of State Practice and *Opinio Juris* into Customary International Law: Understanding How Custom Acquires Normative Force

*Mollie Bailey Hammerton*

## Abstract

*International cooperation between states is becoming increasingly difficult due to deepening geopolitical "tensions" and "divides."[1] Guzman and Hsiang have suggested that customary international law (CIL) may have the "potential" to resolve such "intractable cooperation" issues because CIL is binding on all states and "consent" is not required for it "to be binding."[2] However, the normative force of CIL and how it becomes binding upon states remains unsettled in international law. In this respect, this article seeks to clarify how CIL becomes binding upon states by examining the two elements of customary international law: state practice and opinio juris. It argues that the Voluntarist understanding of CIL places disproportionate emphasis on the requirement of consent and that the normative force of CIL depends on there being a general practice that states generally accept as law. In this regard, this article analyses the persistent objector rule and argues that it provides an exception to the universal binding force of CIL by allowing states to unilaterally express their will. Lastly, it is suggested that although the two-elements of CIL apply more strictly for particular CIL, particular CIL should not be deemed a "tacit agreement."[3] Thus, for general CIL to acquire normative force and become binding on all states there must be a general practice that states accept as law.*

## Introduction

International cooperation between states is becoming increasingly difficult due to deepening geopolitical "tensions" and "divides."[4] Consequently, there is less effective international "cooperation" and "collective problem solving."[5] Guzman and Hsiang have suggested that "strict adherence" to consensual forms of rulemaking, such as treaties, only further "impedes" cooperation.[6] However, customary international law (CIL) may have the "potential" to resolve such "intractable cooperation" issues.[7] CIL is binding upon all states and "state consent" is not required for it "to be binding."[8] Informed by these issues, this article seeks to clarify how CIL becomes binding upon states. To investigate how custom acquires normative force, my article adopts a Positivist perspective of international law and focuses on understanding the rules as

[1] António Guterres, 'Secretary Generals Address to the General Assembly' (*United Nations*, 20th September 2022) https://www.un.org/sg/en/content/sg/speeches/2022-09-20/secretary-generals-address-the-general-assembly accessed 30th September 2022.
[2] Andrew Guzman and Jerome Hsiang, 'Some Ways that Theories on Customary International Law Fail: A Reply to Laszlo Blutman' (2014) 25 European Journal of International Law 553, p554-559.
[3] Khagani Guliyev, 'Local Custom in International Law: Something in Between General Custom and Treaty' (2017) 19 International Community Law Review 47, p56-58.
[4] Guterres (n 1).
[5] ibid.
[6] Guzman and Hsiang (n 2) p554-559.
[7] ibid.
[8] Andreas Follesdal, "The Significance of State Consent for the Legitimate Authority of Customary International Law" in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022) p129.

being "posited" by states.[9] In other words, binding legal rules are developed overtime by states and this is an "observable social reality."[10]

My article argues that the normative force of CIL may depend on there being a general practice that states accept as law. My argument unfolds in three stages. Part One introduces CIL and considers the two elements, state practice and *opinio juris*, that are required for custom to acquire normative force.[11] I will refute the tacit agreement theory to argue that state consent "contributes very little" to the formation of a binding CIL rule.[12] Instead, I argue that for CIL to acquire normative force there must be a general practice that states generally accept as law. Part Two argues that the persistent objector rule allows for states to unilaterally express their will to prevent themselves from being bound by the majority. I will refute the suggestion that the persistent objector rule provides support for the tacit agreement theory for three main reasons. Firstly, I suggest that if the normative force of CIL is dependent on state consent, then a state would only have to demonstrate a "single objection" to an emerging rule and not *persistently* object.[13] Secondly, I argue that the "assertion that states cannot exempt themselves" from *jus cogens* rules does not support the Voluntarist theory.[14] Lastly, I contend that the lack of subsequent objector rule undermines the Voluntarist theory.[15] In Part Three I argue that, although the two-elements of CIL apply more strictly for particular CIL, the normative force of particular CIL does not depend on state will.[16] I suggest that the normative force of particular CIL, similarly to general CIL, depends on there being a general practice by the affected states that is accepted as law.[17] I conclude by arguing that the normative force of CIL may depend on there being a general practice that states accept as law.

## Introduction to Customary International Law

In international law, there are four sources of law under Article 38(1) of the Statute of the International Court of Justice. These are international treaties,[18] "international custom,"[19] "general principles of law"[20] and "judicial decisions" and "teachings of the most highly qualified publicists."[21] Within Article 38 a distinction is made between primary[22] and subsidiary[23] sources of law. The primary sources of international law are international treaties, customary international law and general principles of law.[24] Subsidiary sources of international

[9] Vassilis Tzevelekos and Antal Berkes, "Sociological Objectivism: Still Relevant?" in Rossana Deplano and Nicholas Tsagourias (eds) in *International Law: A Handbook* (Edward Elgar 2021) p447-448.
[10] ibid.
[11] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 38(1)(b).
[12] Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1992) 12 Australian Yearbook of International Law 22, p38.
[13] James Green, The Persistent Objector Rule in International Law (OUP 2016) p244-246.
[14] ibid p191-197.
[15] ibid.
[16] Guliyev (n 3).
[17] *Asylum Case* (Colombia v Peru) [1950] ICJ Rep p226, para276-277.
[18] ICJ Statute, (n 11) art 38(1)(a).
[19] ibid, art 38(1)(b).
[20] ICJ (n 11), art 38(1)(c).
[21] ibid, art 38(1)(d).
[22] ICJ (n 11), art 38(1)(a)-(c).
[23] ibid, art 38(1)(d).
[24] ICJ (n 11), art 38(1)(a)-(c).

law, judicial decisions and scholarship, do not create legal rules but are useful for providing an understanding of the law and its criticisms.[25] In the international legal system, the judicial decisions taken by the International Court of Justice (ICJ) do not set precedents and have "no binding force except between the parties of that particular case."[26] Notwithstanding, the Court consists of judges of the greatest expertise and decisions are of legal importance, not least in clarifying the scope of existing treaty and customary rules.[27]

International treaties are governed by the Vienna Convention on the Law of Treaties 1969 (VCLT).[28] The VCLT requires that treaties are concluded "in written form."[29] While the VCLT does not define the meaning of "written form," this requirement serves to "evidence the existence of consent between at least two parties" and identify the content of the agreement.[30] Treaties have relative effect and bind those states that are party to the given treaty. In other words, treaties do not create "obligations or rights" for a "third state without consent."[31]

The focus of my article is customary international law (CIL). Under Article 38 (1)(b), custom is defined as "evidence of a general practice accepted as law."[32] In contrast to treaties, CIL is an unwritten source of law. In principle, general CIL is binding upon all states irrespective of whether they have agreed to the rule, except for those states recognised as "persistent objectors."[33] A persistent objector state is one that has "persistently objected to an emerging" CIL rule and has maintained its "objection" once the "rule has crystallized."[34] As such, the rule is "not opposable" to the persistent objector state so long as the objection is maintained.[35]

For custom to acquire normative force and become a binding law upon states, two elements must be satisfied. Firstly, there must be general state practice and, secondly, this practice must be accepted as law (*opinio juris*).[36]

## The Normative Force of Customary International Law

The question of how CIL acquires normative force and becomes legally binding on states is subject to continued debate. In the 19th and early 20th centuries Voluntarism, a school of thought within Positivism, was the dominant legal theory.[37] The Permanent Court of International Justice (PCIJ) in the *Lotus* case captures the Voluntarist understanding of international law: the

[25] ibid, art 38(1)(d).
[26] ICJ (n 11), art 59.
[27] ibid, art 2.
[28] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[29] ibid, art 2(1)(a).
[30] Oliver Dörr and Kirsten Schmalenbach, "Article 2: Use of Terms" in Oliver Dörr and Kirsten Schmalenbach (eds) Vienna Convention on the Law of Treaties: A Commentary (Springer 2012), p29-54.
[31] VCLT (n 28), art 34-38.
[32] ICJ Statute, n11, Art 38(1)(b).
[33] *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116, 19; Michael Akehurst, 'Custom as a Source of International Law' (1975) 47 British Yearbook of International Law 1, para23-27.
[34] International Law Commission (ILC), Draft Conclusions on Identification of Customary International Law with Commentaries (2018) UN Doc A/73/10 (Para 66), Conclusion 15 [1].
[35] ibid, Conclusion 15 [6].
[36] *North Sea Continental Shelf* (Federal Republic of Germany/Denmark) [1969] ICJ Rep 3, [77]; ILC, Draft Conclusions on Identification of Customary International Law (2018) UN Doc A/73/10 para 65, Conclusion [2].
[37] Tzevelekos and Berkes, (n 9) p437-438.

rules legally binding upon states exclusively depend upon state will. In the decentralised international legal system, states are legally sovereign, and their sovereignty can only be limited by their will.[38] For Voluntarists, a state can only be bound by laws that it has willingly consented to.[39] In the case of CIL, where no express consent is required, Voluntarists deem a "passive state" to have tacitly consented to the emerging CIL rule.[40] Thus, while treaties require "express consent," custom requires "tacit consent."[41] This "protects state sovereignty" by reinforcing the understanding that "obligations" cannot be imposed upon sovereign states without their consent, whether this be express or tacit.[42]

However, Mendelson argues that the suggestion that *opinio juris* can equate to tacit consent is a "mere fiction."[43] A state that is ignorant to an emerging practice and remains passive is still bound when the customary rule crystallises. Dahlman suggests that "consent" requires "knowledge" and, therefore, it is difficult to contend that a state was tacitly consenting if it was unaware of an emerging practice.[44] Kolb adopts a similar argument, suggesting that consent "presupposes some form of awareness."[45] If silence equates to tacit consent, then this would mean that states possess "perfect knowledge" of emerging practices and have "unlimited resources" to react but in reality this is not the case.[46] As Judge Simma has suggested, to rely on the understanding of international law as articulated in *Lotus* is to "revert" to "nineteenth-century positivism" which was "excessively deferential" to state will.[47] Thus, the Voluntarist emphasis on state sovereignty does not accord with the modern reality of the international legal system as there are obligations that legally bind states with, without or against their will.[48]

I will consider the two elements of CIL, state practice and *opinio juris*, separately to argue that the normative force of CIL may depend on there being a general practice that states generally accept as law.

## State Practice

Practice, the objective element, is primarily the practice of states,[49] including physical acts, verbal acts and sometimes inaction.[50] States, as the "primary subjects" of the "international legal system" and "possessing general competence," have a "pre-eminent" role in creating

[38] *SS. 'Lotus' (France v Turkey)* [1927] PCIJ (ser. A) No. 10, para18-19.
[39] Patrick Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 International and Comparative Law Quarterly 779, p795.
[40] Christian Dahlman, 'The Function of *Opinio Juris* in Customary International Law' (2012) 81 Nordic Journal of International Law 327, p334.
[41] Annie-Marie Slaughter & Steven R Ratner, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93(2) American Journal of International Law 291, p303-305.
[42] Dahlman (n 40), p336.
[43] Maurice Mendelson, 'The Subjective Element in Customary International Law' (1995) 66 British Yearbook of International Law 177, p185-186.
[44] Dahlman (n 40) p334.
[45] Robert Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 Netherlands international law 119, p143.
[46] Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 Virginia Journal of International Law 449, p522.
[47] *Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ 432, Declaration of Judge Simma [8].
[48] Pellet (n 12) p33.
[49] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 13 [27].
[50] ILC Conclusions (n 36) Conclusion 6 (1).

practice during the formation of a customary international law rule.[51] Nevertheless, the practice of international organisations can, "in certain cases," "contribute to the formation or expression" of a customary international law rule.[52] For example, when states have "transferred exclusive competences to the international organisation" and the organisation "exercises some of the public powers of its member states."[53]

Practice must be general which, according to the International Court of Justice, means "extensive and virtually uniform."[54] In comparison, the International Law Commission (ILC),[55] has also required practice to be "sufficiently widespread," "representative" and "consistent."[56] "Virtually uniform" and "general" practice are not directly equivalent. However, both articulations of practice demonstrate that universal agreement is not required.[57] The exact number of states or acts required cannot be prescribed as what is "sufficient" is context dependant, although, the passage of time is required for practice to reach the threshold of "general."[58] While major inconsistencies in practice may prevent an emerging rule from becoming established as customary law, "complete consistency" is not required and not "all states" have to participate.[59]

However, in the *North Sea Continental Shelf Case*, the ICJ opined that an important consideration is "specially affected states."[60] Specially affected states are states whose "interests" are directly affected by a given rule.[61] If the ICJ required agreement by all specially affected states then this may support the tacit agreement theory. It seems more likely that in the *North Sea Continental Shelf* case, the ICJ required participation by states that were not party to the Convention but had interests in the Continental Shelf and not merely land-locked States.[62] The ILC supports the latter reading by suggesting that specially affected states include those whose interests are directly engaged and so should be reflected in the practice.[63] In any event, an attempt to decipher which states are "specially affected" by a given rule would be difficult. For example, in the *Legality of the Threat or Use of Nuclear Weapons* case, the issue arose over which states are "specially affected:" those that may "use nuclear weapons" or those that may have nuclear weapons "used against them."[64] The ICJ did not pronounce directly on this issue, but in his Dissenting Opinion, Judge Weeramantry stated that "every nation in the

[51] ILC Commentaries (n 34) Conclusion 4 [2]-[3].
[52] ibid, Conclusion 4 [4].
[53] ILC Commentaries (n 51), Conclusion 4 [6].
[54] *North Sea Continental Shelf* (n 36), para74.
[55] The ILC is a subsidiary organ of the United Nations General Assembly, tasked with the "development" and "codification" of international law under Article 13(1) of the United Nations Charter.
[56] ILC Conclusions (n 36) Conclusion 8 [1].
[57] Christian Tomuschat, 'Obligations Arising for States Without or Against their Will' (1994) 241 Hague Academy of International Law p195, p280.
[58] ILC Commentaries (n 34) Conclusion 8 [2] [9].
[59] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 4 [186]; ILC Commentaries, (n 34) Conclusion 8 [3].
[60] *North Sea Continental Shelf*, (n 36) para73-74.
[61] ibid.
[62] Tomuschat (n 57) p280-81.
[63] ILC Commentaries (n 34) Conclusion 8 [4].
[64] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226; Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm D. Evans (ed) *International Law* (5th edn, OUP 2018), p95.

world is specially affected by nuclear weapons."[65] Generally, for CIL, it is logical that practice is required to be "general" as some states do not actively participate due to ignorance of an emerging rule or that inaction binds them. In any event, it would be unrealistic to undertake an assessment of the practice of each state.[66] Therefore, general practice is not understood to require participation by *all* states.[67]

**Opinio Juris**

In addition to general practice, *opinio juris* is required to establish a legally binding CIL rule. This subjective element distinguishes mere habits from legal obligations.[68] Practice that is motivated by non-legal obligations, that states can freely ignore, is insufficient to establish CIL.[69] Voluntarists, such as Vattel or Triepel, understood *opinio juris* as "tacit consent" and *Lotus* supports this argument.[70] However, the more recent jurisprudence of the ICJ suggests that the normative force of CIL does not depend on state will. In the *North Sea Continental* case, the ICJ declared that CIL is binding…independent of "direct or indirect" assent.[71] Instead, practice must be undertaken because states have a common "belief" or "feel" that a practice is a "legal obligation" or "duty."[72] As Judge Lachs stated in his Dissenting Opinion "universal acceptance" is not required.[73] More recently, the ICJ suggested it is not merely the "shared view" or "recognition" between the Parties before the Court but the recognition of a practice as law by states collectively that makes it binding.[74] Interestingly, in *Lotus* the PCIJ qualified their bold statement, that a state cannot be bound without its will, by adding that the "usages" were "generally accepted,"[75] which indicates that not each and every state must willingly accept the practice.[76] The ICJ and PCIJ dicta suggests that the consent of all states is not required.

Similarly, the ILC has rejected consent and referred to the subjective element as "acceptance as law" with *opinio juris* added in brackets. The Conclusions employ the term "*opinio juris*" coupled with "acceptance as law," because "it may capture better the particular nature of the subjective element of customary international law as referring to legal conviction and not to formal consent."[77] Commentary to Conclusion 9, explains that states must carry out a practice through a "conviction" that it is a "legal right or obligation,"[78] and provided "non-exhaustive" examples of ways a state can evidence "acceptance as law."[79] This includes inaction where states in a position to react do not and this may be taken as "toleration" of the practice.[80] The

[65] ibid, Dissenting Opinion of Judge Weeramantry, para313-314.
[66] Kelly (n 46) p475.
[67] ILC Commentaries (n 34) Conclusion 8 [3].
[68] ILC Conclusions (n 36) Conclusion 9 [2].
[69] ILC Commentaries (n 34) Conclusion 9 [3].
[70] Dahlman (n 40) p330-331.
[71] *North Sea Continental Shelf* (n 36) para37.
[72] ibid para77.
[73] Ibid para229-330.
[74] *Nicaragua* (n 59) p184-185.
[75] *Lotus* (n 38).
[76] Mendelson (n 43) p181.
[77] ILC Commentaries (n 34) 123 footnote 665.
[78] ibid, Conclusion 9 [2].
[79] ILC Commentaries (n 77), Conclusion 10 [3].
[80] ibid, Conclusion 10 [8].

ILC therefore expressly dismisses "state consent" as a "plausible" basis for the normative force of customary international law.[81] Instead, the ILC seems to understand the normative force of CIL as the shared "acceptance" or "belief" of a practice as law by states generally rather than individual consent or will.

Conversely, it could be argued that nouns such as "acceptance," "belief" or "feeling" are referring to consent. However, this is not clear as belief and consent are distinct concepts. As Pellet suggests, having a *feeling* that something is an obligation is different to *consenting* to it.[82] If the ICJ and ILC were referring to consent or state will, reference could have been explicitly made. A necessary condition for CIL to form is that *some* states must have actively participated and accepted the rule as law. This means that these states may have engaged their will for a customary rule to "begin to be created."[83] However, understanding *opinio juris* as acceptance or belief consequently means it is sufficient that states *generally* believe the practice to be law rather than *individually*. Dahlman defends this view. He contends that inevitably some states will be bound by obligations they have not accepted and are unaware of due to the universal binding force of CIL.[84] "State will" therefore "contributes very little" to the formation of a CIL rule.[85]

In contrast, Kelly is critical of CIL's ability to bind all states. He suggests that CIL rules are established without the engagement of most states which makes it undemocratic and "illegitimate" leading to his radical conclusion that CIL should be rejected and replaced by a "consensual process."[86] However, CIL is a necessary source of law. If the normative force of CIL depends on a practice being "accepted as law" by the community of states, then this gives CIL the important capability to bind states without their consent unlike treaties. Therefore, if a dispute concerns general CIL, there is no requirement to prove that the states party to the dispute have "accepted" or "participated" in the practice but only that the CIL rule exists.[87] This is so because a state that has not contributed to a practice and can provide no evidence in its support towards a rule will still be bound by custom.[88] CIL imports flexibility in the international legal system and allows for the creation of rules without universal consent.[89] This is important because without flexibility law making may stagnate.[90]

Alternatively, the argument could be made, in accordance with the Sociological Objectivism school of thought, that CIL owes its normative force to moral or social necessity. The full maxim, *opinio juris sive necessitatis* (opinion of law or necessity) supports this. In direct opposition to Voluntarism, Sociological Objectivism argues that the law is "posited" by "the

[81] Follesdal (n 8) p111.
[82] Pellet (n 12) p37.
[83] Mendelson (n 43) p192.
[84] Dahlman (n 40) p335-336.
[85] Pellet (n 12) p38.
[86] Kelly (n 46) p519-523.
[87] Roberts and Sivakumaran (n 64) p96.
[88] *North Sea Continental Shelf* (n 36) para37.
[89] Guzman and Hsiang (n 2) p557.
[90] ibid.

needs of society" rather than by the states themselves.[91] In other words, Sociological Objectivism suggests that the binding nature of CIL does not depend upon state will but because an obligation is perceived as a socially required norm. The ICJ has previously associated CIL with necessity.[92] In the *Nuclear Weapons* Advisory Opinion, the ICJ suggested that international humanitarian law rules were so "elementary" that they constituted "intransgressible principles of CIL."[93] This was reiterated in the *Wall* Advisory Opinion.[94] In addition, the ICTY has found customary law based upon necessity.[95] This explanation of the normative force of CIL rightly considers that a function of law is to adapt to societal needs and accurately reflects that law making is broader than the will of the sovereign. However, the "Conclusions on Identification of Customary International Law" by the ILC did not endorse necessity by omitting "*sive necessitates"* and rejecting "instant custom.[96] Instant custom would mean that a "new" CIL rule would come "into existence instantly" thereby creating a new rule to respond to a pressing societal need.[97] Yet, the ILC's rejection of instant custom suggests that it does not understand the normative force of CIL to be societal necessity. In any event, moral imperatives may not help to distinguish legal obligations from moral obligations. Akehurst suggests that, for example, donating aid is practised by some states underpinned by a social obligation but not a legal obligation. It is likely that a rule that has a moral appeal may contribute to establishing moral rules but may not explain the normative force of CIL.[98]

In summary, the tacit agreement theory should be dismissed because state will alone is not the normative force of CIL. States can be bound by a CIL rule without agreeing to a practice and without their will. Although the normative force of CIL remains unsettled, the ICJ and ILC seem to require a general practice to be accompanied by a common "belief" or "acceptance" among states of a practice as law.

**Persistent Objection – A Way to Exercise State Will**

The persistent objector rule provides for a state that persistently objects to an emerging customary law rule to unilaterally prevent itself from being bound if the rule crystallises.[99] The ICJ has endorsed the persistent objector rule in the *Asylum*[100] and *Fisheries*[101] cases. To be recognised as a persistent objector, a state must clearly and expressly communicate its objection to the international community during the formation of an emerging custom.[102] The objection must be persistent, requiring a State to repeatedly reject the emerging custom.[103] For example, in the *Fisheries* case, the UK argued that the "ten-mile rule" should be used to draw

[91] Tzevelekos and Berkes (n 9) p454.
[92] *North Sea Continental Shelf* (n 36) para77.
[93] *Nuclear Weapons* (n 64) para79.
[94] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 para157.
[95] *Kupreškić et al*, IT-95-16-T ICTY [2000] para527.
[96] ILC Commentaries (n 34) Conclusion 8 [9].
[97] Bin Cheng, 'United Nations Resolutions on Outer Space: 'Instant' International Customary Law?' in Studies in Space Law, (OUP, 1997) p147.
[98] Akehurst, (n 33) p34-35.
[99] ILC Conclusions (n 36) Conclusion 15.
[100] *Asylum* (n 17) p277-278.
[101] *Fisheries* (n 33) p19.
[102] ILC Conclusions (n 36) Conclusion 15 [1].
[103] *Fisheries* (n 33) para19; ibid, Conclusion 15 [2].

the baseline and measure the breath of territorial sea.[104] The Court stated that the "ten-mile rule" had "not acquired the authority of a general rule of international law" but, in any event, Norway had "always opposed" the ten-mile rule.[105] Additionally, any persistent objection must also be consistent, requiring the state to adhere to its stance on the emerging custom. Moreover, once a custom is established the state must maintain its persistent and consistent objection otherwise it may be deemed to have accepted the rule or acquiesced.[106]

The persistent objector rule has been termed the "acid test" of Voluntarism because, Weil argues, it provides a logical explanation for the theory.[107] For Voluntarists, the persistent objector rule provides "meaning" to the "notion of silence as tacit consent" by providing "an option of withholding consent."[108] I submit that the persistent objector rule does not provide support for tacit agreement theory for three main reasons.[109] Firstly, to purport that a silent state has tacitly consented is problematic because silence does not equate to consent *per se*.[110] There are a plethora of reasons why states fail to object, including ignorance to a practice, political motives or because they are unaffected.[111] In this regard, Green's argument is persuasive: if the normative force of CIL is dependent on state consent, then a state would only have to demonstrate a "single objection" to an emerging rule and not *persistently* object.[112] In other words, a "lack of consent" should be sufficient to avail a state from an emerging custom.[113] The persistent objector rule and its demands only serve to "undermine" the Voluntarist argument and evidence that the normative force of CIL does not depend on state consent.[114]

Secondly, the persistent objector rule cannot be used to exempt a state from the binding force of a "peremptory norm" of international law.[115] A "peremptory norm" of general international law or *jus cogens* rule is "a norm accepted and recognised by the international community of States as a whole…from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[116] The peremptory nature of *jus cogens* rules mean that they are binding on all states, for example, the prohibition of slavery.[117] As such, the persistent objector rule cannot be used to exempt a state from the binding force of a "peremptory norm" of international law.[118] The peremptory nature of *jus cogens* norms and the inability for any state to persistently object therefore does not support the Voluntarist understanding of customary law.[119]

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[104] ibid.
[105] ibid.
[106] ILC Commentaries (n 34), Conclusion 15 [6] [9].
[107] Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 American Journal of International Law 413, p434.
[108] Green (n 13) p9, p244.
[109] Guzman and Hsiang (n 2) p556.
[110] ibid, p556.
[111] ibid.
[112] Green (n 13) p244-246.
[113] Dumberry (n 39) p795.
[114] Green (n 13) p245-246.
[115] ILC Conclusions (n 36) Conclusion 15 [3].
[116] VCLT (n 28) Art 53.
[117] International Law Commission, 'Report of the International Law Commission of the work at the Seventy-first Session,' (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, Chapter V.
[118] ILC Conclusions, (n 36) Conclusion 15 [3].
[119] Green (n 13) p245-246.

Lastly, owing to the requirement that a state must object during formation of a custom, there is no subsequent objector rule;[120] the ICJ has confirmed that an established CIL rule has equal normative force for all states.[121] This includes new states, who cannot exempt themselves from CIL by virtue of the persistent objector rule,[122] despite neither actively participating nor accepting the existing laws of the international legal system.[123] Instead, for states to reject a pre-existing rule of custom states must collectively change or develop a new rule.[124] If the normative force of CIL depends on state will then there is no reason why a state cannot exempt itself from CIL at any point but, this does not happen. Therefore, this proves that the normative force of CIL does not entirely depend on state will.

In summary, the persistent objector rule allows a state to exercise its will by providing a mechanism to prevent it from being bound by the majority.[125] The ILC requires that a state must unequivocally satisfy the "stringent" requirements so expressing such a will may be difficult to achieve and maintain.[126] Usually, then, CIL binds states regardless of their will to be bound unless they have persistently expressed their will and are exempt by virtue of the persistent objector rule.

**Particular Customary Law – Closer to A Tacit Agreement**

In contrast to general CIL, particular CIL (including regional, special and local custom) is not binding on all states but only upon a limited number.[127] This may be as little as two in the case of a bilateral custom.[128] These states are usually connected in some way, for example, regionally or culturally.[129]

For particular CIL to be established, the same two-element approach applies.[130] However, the requirement of "general practice" for particular custom is modified. "General" requires that "all of the states" to which the rule applies consistently participate.[131] This requirement suggests that "unanimity" in practice is necessary and that particular custom is binding only on those states that have actively participated.[132] In two cases concerning particular CIL the ICJ has supported this interpretation by requiring "constant and uniform"[133] practice by the "states in question."[134] The ILC Conclusions similarly suggest that there must be "consistent practice" by "*all* the states among which the rule in question applies."[135] To establish a CIL rule as legally

[120] ILC Commentaries (n 34) Conclusion 15 [5].
[121] *North Sea Continental Shelf* (n 36) para63.
[122] Green (n 13) p173-179.
[123] ibid.
[124] ibid.
[125] Green (n 13) p239-273.
[126] ILC Commentaries (n 34) Conclusion 15 [7].
[127] ILC Conclusions (n 36) Conclusion 16 (1).
[128] *Right of Passage over Indian Territory (Portugal v. India)* (Merits) [1960] ICJ Rep 6 para39.
[129] ILC commentaries (n 34) Conclusion 16 [5].
[130] ILC Conclusions, (n 36), Conclusion 16 (2).
[131] ILC Commentaries, (n 34), 16 [7].
[132] Guliyev (n 3) p52.
[133] *Right of Passage* (n 128) para40.
[134] *Asylum* (n 17) para276-277.
[135] ILC Commentaries (n 34) Conclusion 16 [6].

binding, the states must also believe that this practice is "accepted as law" (*opinio juris*). In the *Right of Passage Case*, the Court found the practice to be "accepted as law by the Parties."[136] Similarly, the ILC commentaries expressly require "each" state to have accepted the practice as law.[137] The inference is that a state which does not accept the practice is not bound. Thus, for particular custom the two-element approach applies more strictly than for general custom.[138]

As Guliyev suggests, the stricter approach allows for particular CIL to be regarded as "consensualist" and described as a "tacit agreement."[139] Guliyev suggests that an important distinction between general and particular custom is how each is affected by state succession. In contrast to general CIL, particular custom is not automatically opposable to new states. As Guliyev argues, in this instance particular CIL follows the "treaty logic" because new states cannot be bound without agreement.[140] This suggests that, to an extent, particular custom depends on state will. While it is plausible that particular CIL is akin to a tacit agreement, I submit that it should not be given this label. In support of this argument, Guliyev suggests that a particular CIL rule does not represent a tacit agreement because it follows "the logic of general custom in its formation" as opposed to "contracted law" which requires state consent.[141] In other words, the normative force of particular CIL is not consent but, similarly to general CIL, states must generally "accept" or "believe" their practice to be a legal obligation.[142]

In summary, the stricter application of the two-element approach suggests that particular CIL requires the engagement of the will of the states to which the practice applies. However, this does not mean that particular CIL should be understood as a tacit agreement. State consent is not the normative force of particular CIL and, instead, states must "accept" or "believe" their practice to be a legal obligation.[143]

## Conclusion

In this article, I have argued that the normative force of CIL may depend on there being a general practice that states generally accept as law. I have suggested that the Voluntarist understanding of CIL is overly "deferential" to state will and this approach no longer holds true.[144] Instead, I have defended the view that for custom to become binding there must firstly be state practice, which is general, although not universal, in nature. Secondly, there must be *opinio juris*. According to the ICJ and ILC, states must "believe" or "accept" a practice as law. Therefore, states do not need to individually consent to a practice to become bound by it. Instead, it is sufficient that there exists "broad approval among states" of a general practice for

[136] *Right of Passage* (n 128) para 40.
[137] ILC Commentaries (n 34) Conclusion 16 [7].
[138] ibid.
[139] Guliyev (n 3) p54-55.
[140] ibid, p55-61.
[141] Guliyev (n 3) p50.
[142] ibid p56-58.
[143] ibid.
[144] *Kosovo* (Advisory Opinion) (n 47) Declaration of Judge Simma [8].

it to become binding upon every state.[145] Furthermore, I have argued that the persistent objector rule does not provide support for the tacit agreement theory but provides an exception to the universal binding force of CIL by allowing for a state to exempt itself from a CIL rule. Lastly, I have suggested that the stricter two-element approach for particular CIL does not mean that it should be labelled as a "tacit agreement."

Importantly, then, general CIL has the capability to bind all states. In the decentralised international legal system, with no legislature or supreme court, general CIL rules are essential to fill the legal lacunas not filled by treaties.[146] In this respect, CIL as a form of "non-consensual" rulemaking should be embraced to facilitate improved global cooperation in an increasingly divided world.[147] Therefore, although the normative force of CIL continues to be debated, it is nevertheless an important source of international law.

[145] Dahlman (n 40) p339.
[146] Kolb (n 45) p119-150; Kelly (n 46) p459.
[147] Guzman and Hsiang (n 2) p553-559.

# The Dark Web: The Beast Created by The State, Used by The People and Now Haunting Law Enforcement Agencies Globally

*James Giddins*

## Abstract

*The technological revolution of the 21st century has proven beneficial in many sectors, streamlining the process, and reducing costs. However, the evolution has caused a daunting side effect which we are only starting to see more prominently in recent years. This paper seeks to provide reasoning as to why the Dark Web has become a space that is difficult to police as well as regulate. In addition, it will offer potential reforms that balance individual liberties whilst maintaining law and order within society.*

## Introduction

This paper will explore the challenges that the Dark Web presents for law enforcement and whether the tactics used to combat these illicit operations are sufficient to work in harmony with the legal framework to deter individuals. Throughout this paper, arguments will be analysed through the lens of philosophical schools of thought, and the potential reforms that may arise from this.

## Functioning of the Internet

Whilst many regard the internet as the typical search engines such as Google, there is a deeper level that many do not have a full understanding of. The Dark Web is an encrypted network which is built on top of the internet, meaning that communication across the network is virtually unreadable. To access this encrypted network, specialist encryption software is required. Most notably 'The Onion Router' (ToR) is the chosen software for many individuals wishing to browse this underworld of the internet. However, there are others such as I2P and Freenet. Whilst ToR is often associated with the illicit operations of criminals, its origins diverge from its original introduction. In 1995, the United States Navy Office of Research funded research to create a program that would enable their officials to send anonymous communication. This was designed to ensure global anonymity and analysis of messages regarding sensitive information being unreadable. The prototype peaked at 84,000 visits, and ever since the publicly available project was released in 2004, it has climbed to highs of over 2,000,000 daily visits.[1] ToR software operates by installing an onion proxy, an interface between a client and the Tor network. It then downloads the onion router information from a directory server; a large storage device that facilitates the network. The client request, also known as 'packets' are sent through the network, directing the packet through three different 'nodes' (redistribution points on a network). These nodes are scattered across the globe, and it is suggested there are over 900 to conceal the true location of the search. The 'packet' is then exited through a final node in which the user can then access the Dark Web. Anyone who is

[1] Ramzi A. Haraty and Bassam Zantout, 'The TOR Data Communication System: A Survey' (2014) IEEE Symposium on Computers and Communications (ISCC) 1, p3.

examining a certain individual's movement will not see the true location of their digital movements as the final exit node is what will be listed when a user visits a Dark Web site.[2]

**Early Dark Web Investigations**

The Dark Web is often renowned for its illegal operations run within, illicit operations include but are not limited to drug dealing, child pornography and hacking. Estimates show that there are around 2 million daily users on ToR and around 7,000 to 30,000 active sites and around 57% of these are used for illicit purposes.[3] The emergence of Dark Web crime has generated numerous challenges for LEAs (law enforcement agencies). The first major difficulty is trying to locate individuals facilitating crimes on the dark web. Due to the technology used, it makes it extremely difficult for LEAs to pinpoint their investigations, however, techniques are being used to combat this issue which will be discussed later. As the IP address and data which would usually locate individuals' locations and their real identity are masked, the early takedown of marketplaces consisted of identifying human error. As seen from the takedown of the 'Silk Road', which was the first-ever Dark Web marketplace selling illicit goods utilising pseudonymous technology. A vendor who sold illicit goods on the site, Olivia Bolles, was only captured due to an error on her part in using her credit cards to purchase items to further her illicit business, such as chemicals and equipment. In addition to this, she also used her real identity to rent out a P.O. box which ultimately led to her arrest by the authorities.[4] Alongside this, Ross Ulbricht the creator and admin of 'Silk Road" was identified due to human error when establishing the marketplace. This simple error led to the downfall of one of the most notorious sites which would change how crime operates and the ability of LEAs to fight it. The error was very alike Bolles' in her operation where whilst Ulbricht did not use his real ID, he did use his photograph on nine fake IDs intercepted from Canada which he planned on using to rent out servers to facilitate the operation of Silk Road. Therefore, the first challenge enhanced by the Dark Web is the difficulty of being able to pinpoint the individuals facilitating the illicit operations. Without the errors seen in the case of 'Silk Road', it is difficult to argue that the takedown of the site and the administrators behind it would have been as timely as it was, or arguably, even at all.

However, viewing these marketplaces through a philosophical lens, we can argue that the targeting of marketplaces can be said to infringe on an individual's liberty. As Ulbricht stated on his LinkedIn profile, he wanted to create 'an economic simulation to give people an experience of what it would be like to live without the systemic use of force'. The systemic use of force he is referring to is the intervention from the state in free markets, a concept that Nozick fundamentally disagrees with and believes individuals should be free from state intervention to maximise wealth. Paired with the idea of the 'harm principle' established by Mill, it poses the argument that the use of drugs is only harming the individual using them and therefore, the state intervening will infringe on an individual's freedom. Meaning, that the

[2] Yinan Pei and Kazumasa Oida, 'Tracing Website Attackers by Analyzing Onion Routers' Log Files' (2020) 8 Institute of Electricals and Electronic Engineers 133190, p133192.
[3] Saiba Nazah and others, 'Evolution of Dark Web Threat Analysis and Detections: A Systematic Approach' (2020) 8 Institute of Electrical and Electronics Engineers, 171796, p171796.
[4] United States of America v. Olivia Louise Bolles aka MDPRO, 6:13-MJ-1614 (2015), para 45.

distribution of drugs through the Dark Web should potentially be sanctioned due to limited harm to others. By restricting access to the Dark Web and targeting marketplaces, we must argue that this is infringing on fundamental rights to be equal to our counterparts in society. This is because there is a removal of a potential source of wealth as the law and procedures used to try and regulate the Dark Web hinder equality. Arguably, individuals would not need to turn to this crime to source wealth if society was equal in wealth. Hence, there should be a discussion around increasing the positive uses of the Dark Web and utilising these to increase individuals' freedom and liberty from the state. In recent years, 'whistle-blowers' (individuals who claim and publish unlawful behaviour) have significantly increased. Wikileaks, utilises ToR for individuals to submit their information about classified or hidden files which have led to some stark revelations, the most notably being Edward Snowden leaking files on the NSA and GCHQ spying on other countries and their ministers. Julian Assange, the founder of Wikileaks, also obtained files from ToR which he used as a basis to form the site. Forums on the Dark Web are not all illicit chats regarding drug use and criminal activity, they can also offer positive advice such as 'Doctor X' did. 'Doctor X' was a Spanish doctor who used forums on Silk Road to offer free advice to over 1000 users relating to drug harm reduction.

**Dark Web Transactions Reinvigorate Traditional Crime**

LEAs have the difficult task of trying to combat the basis of this crime on the Dark Web and it is only made more difficult due to the addition of traditional crimes being reinvigorated by the Dark Web. To be able to understand how traditional crime is rejuvenated, we must first look at digital currencies and how these have allowed traditional crimes to be mixed with this elaborate technology to pose challenges. Early transactions on the dark web were often facilitated using a digital currency, the original being Bitcoin. Bitcoin is a digital currency that is not tangible; it is stored in digital wallets and does not depend on a central institution.[5] Whilst all transactions are publicly available on the ledger, called blockchain, the identity of individuals are hidden and replaced with a numerical ID, giving users pseudonymity. However, this technique has been negated by new cryptocurrencies being used on darknets, the most notable being Monero. This cryptocurrency does not operate the same way bitcoin does, with the movement of funds being private, meaning no one can see who has sent you funds or to whom you are sending them to. This additional layer of security enables criminals on the Dark Web to have a reduced chance of being caught by LEAs. Nevertheless, LEAs are utilising blockchain analysis firms to assist with crimes utilising digital currencies.[6]

Cryptocurrencies can be used in money laundering as it allows individuals to make cross-border transactions almost instantaneously without the need for centralised institutions. Though, when withdrawing Bitcoin is where the real challenge arises for criminals because this is the point where they are most susceptible to LEAs. Depositing large amounts of cryptocurrency into a regulated financial institution at once can be very risky as any deposits over £10,000 or a series of transactions that can be linked to an amount over the value must be investigated under section 27 of the Money Laundering, Terrorist Financing and Transfer of

[5] Robert Stokes, 'Virtual Money Laundering: The Case of Bitcoin and the Linden Dollar' (2012) 21 I. &. C.T.L. 221, p226.
[6] Laura Shin, 'How Chainalysis Helps Solve Crimes: Jonathan Levin Tells All – Ep.62' (29th May 2018) https://unchainedpodcast.com/how-chainalysis-helps-solve-crimes-jonathan-levin-tells-all-ep-62/ accessed 4th August 2022.

Funds Regulations 2017. Hence, this is where traditional crime can be reinvigorated. Cryptocurrency money laundering has continued to grow year after year and it is now estimated that cybercriminals laundered $8.6 billion worth of cryptocurrency in 2021, a 30% increase from the previous year.[7]

The first traditional technique and arguably the most used is 'smurfing'. Smurfing is the process where small amounts of funds are withdrawn from accounts or wallets and placed across various accounts linked to the individual to avoid detection from LEAs as small amounts of withdrawals are less likely to be alerted to authorities.[8] However, it has become more difficult for individuals to make withdrawals to UK bank accounts from cryptocurrency exchanges due to the high prevalence of suspected money laundering. Thus, the bank restricts this to protect themselves and their customers from the risk of money laundering and any consequences from regulators by not adhering to the anti-money laundering regulations. Despite UK banks taking a tougher stance on cryptocurrencies, many illicit transactions go under the radar. Another technique used that poses a new and existing challenge to law enforcement is 'cryptocurrency tumbling'. This technique will randomly cycle illicit funds through various cryptocurrencies to make traceability even more difficult.[9] This makes it more difficult for LEAs since the cryptocurrencies being mixed are pseudonymous and therefore, linking the mixed currencies back to the original funds becomes extremely difficult. However, as mentioned previously, chain analysis firms are being used to analyse the tumbling transactions on the blockchain which can then be linked back to the original wallet. Whilst it is a lengthy process, it does not make the funds untraceable from the grasp of LEAs.

Nonetheless, it appears now that LEAs are potentially moving towards targeting the services themselves to combat this crime.[10] When analysing these challenges posed to law enforcement, we can look at the argument for equality. If the owners of Bitcoin sites and exchanges are allowing individuals who possess and use the service to launder illicit funds then, we can argue that they have a role in allowing crime to flourish. However, by convicting the individuals who provide cryptocurrency tumbling services which can also be used to legitimately increase privacy then, those who provide Bitcoin services on a more general level ought to hold some responsibility as well. They should have measures in place to ensure that criminals are not exploiting their service to prosper and avoid detection. Measures that are used to detect criminal activity such as money laundering checks in institutions like banks, building societies and financial investments can be implored to increase the deterrence of criminals on the Dark Web using these services but this then counteracts the fundamental principles of these services which offer a greater level of privacy. This inequality could be caused because on the more general level of crypto services, there is an economic benefit to society due to market fluctuations in which cryptocurrencies operate and the potential use of bitcoin in the future. It

[7] The Chainalysis, *'The 2022 Crypto Crime Report'* (2022) 4, p10.
[8] R.e Bell, 'An Introductory Who's Who for Money Laundering Investigators' (2002) 5 Journal of Money Laundering Control 287, p289.
[9] 'Law enforcement struggles to control darknet' (*IHS Jane's 360*, 30th December 2014) https://web.archive.org/web/20150917074919/http://www.janes.com/article/47455/law-enforcement-struggles-to-control-darknet accessed 4th August 2022.
[10] United States of America v. Larry Harmon, 5:20 MJ 01030 (2020), para 10.

is to be noted that tumbling services only provide a benefit to the individual providing them so, the inequality is arguably outweighed by the positive of being able to invest in the digital currency.

**Law Enforcement Challenges**

Dark Web investigations tend to be very resource-intensive in identifying and taking down illicit marketplaces.[11] The main reason that they are more intensive is due to the difficulty posed by the techniques. For example, using blockchain analysis to identify transactions, paired with the identification of tumbler services being used for illicit funds as well as the main task of identifying the criminal activity on the Dark Web. When convicting individuals for crimes on the Dark Web, the most important part of the investigation is building the paper trail against them; a task that requires intensive labour to investigate large amounts of data which LEAs lack. On top of this, LEAs struggle to keep up with emerging and developing technologies used in dark web crime and so, are in an ineffective position to combat it.[12]

The largest site to exist, named 'Alphabay', was shut down and many of its users fled to other markets to continue illicit activities. Europol enlisted the private entity Bitdefender, a global cybersecurity firm, to advise Europol's Cybercrime Centre on how to tackle the investigation in order to link the crime back to individuals behind the site. They provided resources including decryption software that was used. This eventually proved to be a successful partnership in the takedown of 'Hansa'.[13] Without the additional help of private entities, it is almost certain these investigations would be lengthier and potentially fall into crucial steps such as evidence gathering. Not only do they assist in investigations but they also allow LEAs to make more effective use of limited resources as they are huge force multipliers (a combination of resources to achieve greater outcomes).[14] Nevertheless, using public-private partnerships does not come without challenges. The first one is that it allows the private entity to investigate as they see fit since they are regarded as the 'specialists'.[15] The problem with this is that it could encroach on an individual's liberty as third parties are being enlisted, arguably going against the right to privacy. Further to this, we can argue that the external criticism of whether this is morally correct for outside entities to be involved with state-led investigations as there could be standards that could be undermined if outsourcing is used.

After demonstrating that investigations are more resource-intensive, we can look towards mutual legal assistance treaties (MLATs) as the nature of dark web crime is borderless, a cross-

[11] Matthew Shillito, 'Untangling the 'Dark Web': An Emerging Technological challenge for the criminal law' (2019) 28 ICTL 186, p196.
[12] Jeffery Avina, 'Public-private Partnerships in the Fight Against Crime: An Emerging Frontier in Corporate Social Responsibility' (2011) 18 JFC 282, p287.
[13] Europol Press Report, 'Massive blow to criminal Dark Web activities after globally coordinated operation' (*Europol*, 20th July 2017) https://www.europol.europa.eu/newsroom/news/massive-blow-to-criminal-dark-web-activities-after-globa lly-coordinated-operation accessed 4th August 2022.
[14] Chloe Smith, 'Cyber Security Strategy' (*Cyber Security Summit*, 6th November 2012) https://www.gov.uk/government/speeches/chloe-smith-speaks-at-cyber-security-summit accessed 4th August 2022.
[15] Tom Keatinge, 'Public-Private Partnerships and Financial Crime: Advancing an Inclusive Model' (2017) https://rusi.org/commentary/public%E2%80%93private-partnerships-and-financial-crime-advancing-inclusive-model accessed 4th August 2022.

border solution is needed.[16] The United States leads the fight against Dark Web crime but often has to enter other jurisdictions to finish investigations and identify individuals as shown from the Alphabay takedown, where LEAs obtained warrants in foreign jurisdictions such as Canada and Thailand.[17] A more recent marketplace 'DarkMarket' investigation was led by German authorities but the majority of arrests and asset seizing took place in the United States.[18] We can see from this that the United States leads the fight and lays down the foundations and therefore, the rules. This can be problematic because it is unfair to smaller parties involved who cannot decline as they want to make sure criminals are caught. However, the rules may go against the moral principles in their state which can lead to weakened cooperation between states when conducting investigations. An example could be the use of network investigative techniques (NITs) and whether states wish to engage in what can be argued as hacking. Alongside this, MLATs are difficult to negotiate and slow down the process due to different jurisdictions being involved[19] as there are different beliefs held around pursuing crime on the Dark Web. For smaller states who do not have an extensive pool of resources, they may not prioritise requests and thus, investigations may be stalled.

## Tackling the Legislation

The law surrounding this area is extremely limited. The biggest question is whether warrants are needed to search an individual's possessions. To gain a more rounded understanding of entrapment we can look towards the United States and its approach to entrapment. The 4th amendment right is the right for American citizens to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. It was shown that using NITs did not breach this right as it was merely 'seeing through broken blinds'.[20] Adopting this approach, the Investigatory Powers Act 2016 could potentially allow LEAs to investigate further where there is any evidence within its jurisdiction. One way would be the interception of bulk data as warrants may be issued if it meets certain requirements like threats to national security and proportionate outcomes can be met by the interception under section 158. The argument from the Joseph case[21] is that it could be said LEAs had an illegitimate advantage as entrapment was used. This is a practice used by LEAs to induce someone into committing a crime. The site was administered by agents and the lack of a warrant once again encroaches on an individual's liberty. Though, it is argued that it would only be entrapment if LEAs set up and run sites rather than just a continuation of one simply maintaining a site they have seized.[22] Meanwhile, it has been argued by Haasz that the mere continuation of a site can constitute entrapment.[23] Therefore, if this approach is to be continued, the courts need to update the definition of entrapment to avoid ambiguity on the issue.

[16] Shillito (n 11) p190.
[17] United States of America v. Alexandre Cazes aka "ALPHA02," aka "ADMIN" 1:17 CR 00144 (2017), para 9.
[18] Europol Press Report, 'DarkMarket: world's largest illegal dark web marketplace taken down' (*Europol*, 12th January 2021) https://www.europol.europa.eu/media-press/newsroom/news/darkmarket-worlds-largest-illegal-dark-web-marketplace-taken-down accessed 4th August 2022.
[19] Michaelene K Wright, 'Financing Cr-ISIS: The Efficacy of Mutual Legal Assistance Treaties in the Context of Money Laundering and Terror Finance' (2019) 52 Vanderbilt Journal of Transnational Law 229, p255.
[20] USA v. Edward Joesph Matish 193 F. Supp. 3d 585 (2016), para 690.
[21] ibid, para 690.
[22] Kat Hadjimatheou, 'Policing the Dark Web: Ethical and Legal Issues' (2017), p7.
[23] Amanda Haasz, 'Underneath it All: Policing International Child Pornography on the Dark Web' (2016) 43 Syracuse J. L. & Com. 353, p358.

While no specific law governs the Dark Web, there are statutes referring to Dark Web activity, including the Serious Crime Act 2007 and the Misuse of Drugs Act 1971. Any crime that can be committed via the dark web that can be committed physically will be an offence under a statute. In addition, the Proceeds of Crime Act 2002 has been a tool LEAs use to freeze and confiscate assets during investigations. With the increase of use in cryptocurrency, it is now considered property under section 24 of the Act. Amending laws to incorporate specific dark web activity could be a lengthy process and LEAs simply do not have the time to wait for reform and hence, have to use existing statutes to investigate individuals. The concept of a fair and just law is that it should be simple enough for individuals to understand and maintain adherence to it.[24] Thus, having specific dark web laws will go against this principle of fair and just law. The law surrounding this area would produce unfair results – the first instance of this can be seen in Ulbricht's sentencing, where he was given two life sentences and an additional 40 years.[25] Although he had facilitated the crimes in his marketplace, he did not carry out any specific crimes himself and LEAs never brought charges against him for the five murders of which they accused him of. Therefore, having potentially tainted his image to portray him as a more dangerous individual than he was. As seen from Aristotle, punishment rewardability is all about proportion, we understand human behaviour is both good and bad and if you have done bad, you deserve less opportunity. Countering this, the idea of reciprocity can be argued as 'getting what you deserve'. Supporting prosecutors reasoned that Ulbricht ordered the deaths of six people,[26] one of whom claimed they would release his information. Therefore, looking at the whole picture, Ulbricht was likely to have caused damage on a smaller level relating to drug use of individuals, as well as potentially committing an offence himself. Nonetheless, activists argue that his sentencing was disproportionate and that the sentencing procedures used did not match his crimes.[27]

## Reforms: Reducing or Pausing the Issue

Law enforcement efforts to halt the steep increase in Dark Web crime are proving difficult but have recently had more success occurring.[28] On the other hand, sites that were previously taken down, such as Alphabay, have started to re-emerge with improved security measures covering the flaws of the previous site.[29] Whilst the Dark Web is no longer beyond the scope for LEAs, there is still a need for urgent reform in order to keep the issue from spiralling out of control to a level that cannot be stopped. The current proposed strategy to combat this issue is detailed within the Serious and Organised Crime Strategy.[30] The strategy is guided towards a mitigating

[24] Lon Fueller, *The Morality of Law* (Revised edn, Yale University Press 1969) p39.
[25] Bernard Kerik, 'Dysfunctional Justice System Inflicts Cruel, Unusual Sentences' (*Human Rights Defense Center*, 2nd October 2020) https://www.humanrightsdefensecenter.org/action/news/2020/dysfunctional-justice-system-inflicts-cruel-unusual-sentences/ accessed 10th October 2022.
[26] Nazah (n 3), p171801.
[27] Kerik (n 25)
[28] David Décary-Hétu and others, 'Going international? Risk taking by cryptomarket drug vendors' (2016) 35 Int J Drug Policy 69, p73.
[29] Andy Greenberg, 'AlphaBay Is Taking Over the Dark Web—Again' (*Wired*, 6th June 2022) https://www.wired.com/story/alphabay-dark-web-market-ranking/ accessed 10th October 2022.
[30] Secretary of State for the Home Department, 'Serious and Organised Crime Strategy' (*HM Government*, November 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752850/SOC-2018-web.pdf accessed 10th October 2022.

strategy rather than a preventative one. As seen from the re-emergence of Alphabay, with no solid outline on how to combat dark web crime except by increasing funding is an already failing approach. At the same time, an increase in funding can be slightly helpful due to the fact that it eases the constraints on resource-intensive investigations.

It is widely accepted that there is a lack of understanding and experience within the area.[31] This firstly needs to be addressed as it provides the foundation for investigations. Another proposal for effective reform is the approach to MLATs to improve deterrence. As Dark Web crimes are multi-jurisdictional and borderless, the need for cooperation between states is more important than ever. Many criminals engaging in illicit activities online believe that they are safe from prosecution if their crime is being committed elsewhere to their real location. Whilst the bilateral agreements between states have started to make an impact, there are still issues at large that cause these investigations to lose momentum. The most obvious and difficult to reform are the cultural and moral differences between states.[32] In addition to this, the problem of differing resources in states' legal systems has a profound effect on what is considered 'urgent'[33] which consequently slows down investigations. These delays can result in criminals slipping through the net. A potential reform to this could be an international charter to which states sign up to thus, ensuring a minimum contribution and stance against this issue which could result in harmonised workings amongst states to combat the crime.

The introduction of a global force that is directly responsible for tackling Dark Web crimes should be formed. The potential makeup could mirror that of an IGO (Intergovernmental organisation) where there is a more proportional approach by having inputs and resources calculated against the risk and prevalence of the issue in that country. This eliminates the issue of selective prosecution, such as seen in the takedown of Silk Road where LEAs only targeted the top 1% of sellers compared to Dutch authorities who intended to target all individuals. Alongside this, it will follow a uniform procedure, meaning that reporting will be adequate and sufficient in all states that are contributing to the task force. Thus, this reform will reduce the delay in investigations which is currently an advantage to individuals engaging on the Dark Web. They can evade detection during this short delay by closing their sites and using so-called 'exit scams' where administrators of the site close operations and leave no trace whilst accepting payment with no intention of fulfilling the transactions. Shortly after, the operators will set up a new site, directing users to said new site and in the process, leading LEAs back to square one in building a case against them.

Currently, the Investigatory Powers Act 2016 allows for bulk data examination which allows UK LEAs to intercept data under three instances; if there is a threat to national security, a threat to the economic well-being of the UK or in the support of prevention or detection of serious crime. However, these interceptions must have a warrant and this must be authorised by a

[31] Philip Larratt and others, 'Innovation and the Application of Knowledge for More Effective Policing' (2017), p7.
[32] KPMG, 'Cross-Border Investigations: Are You Prepared for the Challenge?' (*KPMG*, 2013) https://assets.kpmg/content/dam/kpmg/pdf/2013/12/cross-border-investigations.pdf accessed 10th October 2022.
[33] United Nations Office on Drugs and Crime, 'Manual on Mutual Legal Assistance and Extradition' (*United Nations Office on Drugs and Crime*, September 2012) https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf accessed 10th October 2022.

Secretary of State. Once again, the problem posed here is the speed at which the process is conducted. There must be sufficient evidence in order to issue a warrant which as previously discussed, can prove difficult. Hence, a potential reform could be made where warrants may be issued through a process which does not have to be passed through the ministerial chain and possibly introducing terms within the Act that stipulate a warrant can be issued if there is reasonable suspicion that allows for a subjective process. As for the influence of the Investigatory Powers Act 2016, it is mitigated by the General Data Protection Regulation and Data Protection Act 2018 which gives greater transparency and privacy over individuals' data.

Whilst there are criticisms over LEAs efforts on deterring individuals, the UK and the United States have agreed to the world's first bilateral cloud-sharing platform, thus giving LEAs in both countries easier access to electronic information held by tech companies. This is a positive reform that should reap rewards in terms of speeding up the evidence-building process and potentially halting the problem of speed discussed earlier. Whilst reforms are a step in a positive direction, the major difference that will deter individuals is the prosecution and conviction of criminals starting at the top of the chain, as was the case in the takedown of 'Silk Road'. This already started to take shape when the largest illegal marketplace at the time 'DarkMarket' was shut down, with the alleged operator arrested and buyers from the site arrested shortly after, resulting in 150 prosecutions across 8 states. One radical reform proposed by legal theorists would be to take down the Dark Web as a whole[34] but this is not feasible as the service offers practical solutions for issues such as privacy and greater sharing of information on a secure network across borders.

## Conclusion

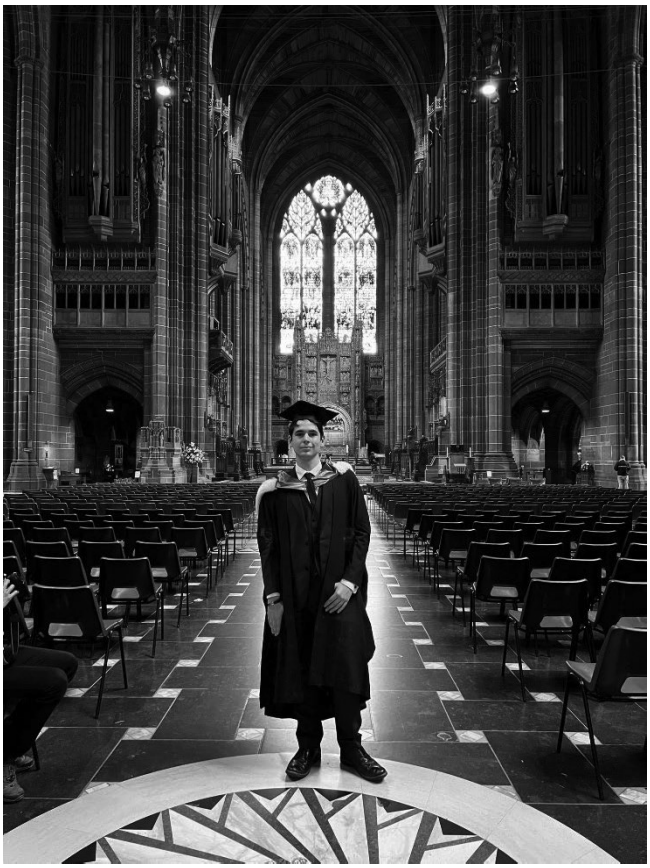
In conclusion, the law and the results it produces have one main aim, to deter individuals. While many sites have been taken down, we can comfortably argue deterrence has not been achieved. Firstly, the takedown of sites does little to deter since many of the proceeds of crime are kept in digital currency which cannot be frozen or recovered without the cooperation of the wallet holder due to its security measures and privacy technology. Secondly, as figures show, it is doing little to deter as prior to 2015, Dark Web sales were at $44 million per annum compared to the current figure which lies at $25 million per month, demonstrating an increase of over 581%.[35] Therefore, we can see that deterrence is very low from a variety of factors from the ability to catch individuals, confiscation of funds and the ability to prosecute.

Further to this, the convictions of individuals who partake in this world of crime need to be sufficiently punished in order to deter others. As seen from Thomas White, founder of Silk Road 2.0, the custodial sentence given to him was just over 5 years.[36] Comparing this to the drastic sentence of Ulbricht, it can be considered that the UK approach is potentially too soft and so, has little impact on those considering the crime. Whilst we cannot predict the future,

[34] Haasz (n 23) p378.
[35] United Nations Office on Drugs and Crime, 'World Drug Report 2018' (*United Nations Office on Drugs and Crime,* June 2018) https://www.unodc.org/wdr2018/prelaunch/WDR18_Booklet_1_EXSUM.pdf accessed 14th March 2021.
[36] 'Thomas White, '*Self-taught computer mastermind behind 'Silk Road' illegal drugs website jailed'* (*The Independent*, 12th April 2019) https://www.independent.co.uk/news/uk/crime/thomas-white-silk-road- drugs-jail-bitcoin-liverpool-a8867996.html accessed 14th March 2021.

we can envisage that this issue is only set to continue and likely to become worse due to the advances in technology including the expansion of privacy cryptocurrency, greater protection of individual's privacy and data, alongside the resource constraints of LEAs.

Susannah Ash – Editor and Communications Officer



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# SHAPING SOCIAL JUSTICE

2022